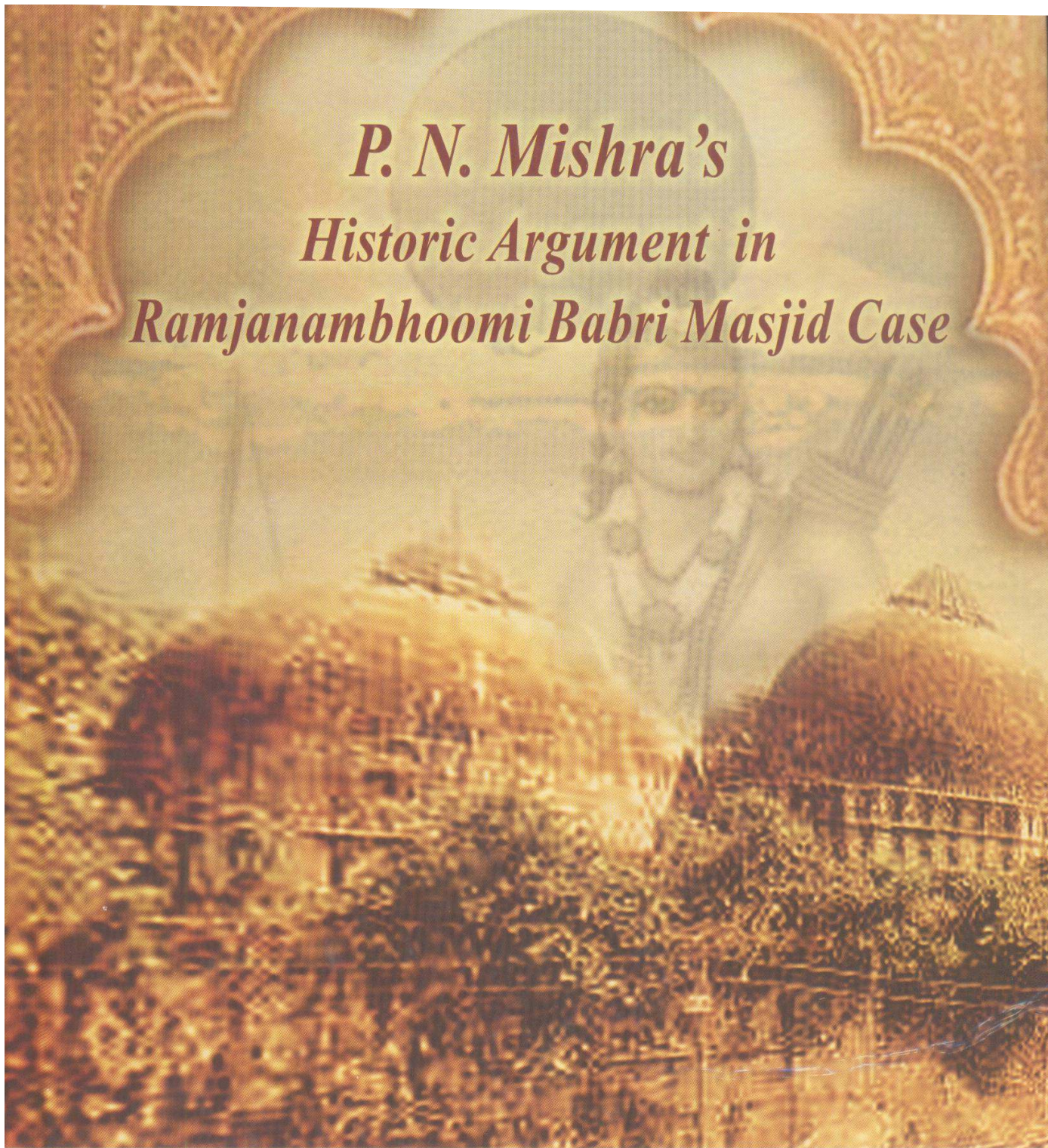


*P. N. Mishra's
Historic Argument in
Ramjanambhoomi Babri Masjid Case*



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in

Sri Ram Janam Bhoomi

Babri Masjid Case

Published by :

Accurate Printers

11 A Uma Kanta Sen Lane

Kolkata-700 030, West Bengal

Phone: (033) 2556-8522

Fax: 2556-8521

Email: accurateprinters@gmail.com

First Edition 2011

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Price : Rs. 1,095.00

Printed at:

The Bose Printing House

11A, Garpar Road, Kolkata- 700009

**I DEDICATE THIS WRITTEN ARGUMENT
TO
BHAGWAN SRI HANUMANJI MAHARAJ
AND
MY HEAVENLY PARENT
SRI BISHWA NATH MISHRA & SMT. SHARDA MISHRA**

Parmeshwar Nath Mishra



JANAM ASTHÁN.

(TARIKH - A - AYODHAYA, PUBLISHED IN 1902)

AUTHOR'S ACKNOWLEDGEMENT

I would like to express my gratitude towards H.H. Jagadguru Shankaracharya Shardamath-Dwarka & Jyotirmath-Badarikashram Mahaswami Swaroopanand Saraswatiji Maharaj; H.H. Swami Avimukteswaranand Saraswaji Maharaj, Acharya Kishore Kunal, Dr. V.P. Pathak, Dr. B.N. Chaturvedi, Smt. Rekha Mishra, Sushree Ranjana Agnihotri Advocate, Smt. Priyambada Tripathi , Sushree Pragya Mishra, Advocate and Sri Pratik Mishra all of them who in some way or the other made it possible for me to argue the case at Lucknow.

I find no words to express my gratitude towards the Hon'ble Justice S.U. Khan J., the Hon'ble Justice Sudhir Agarwal J. and, the Hon'ble Justice D.V. Sharma J. (as then His Lordship was) of the Special Full Bench of the Hon'ble Allahabad High Court, Lucknow Bench for Their Lordships' cordial co-operative attitude, utmost accommodative acts otherwise it would not have been possible for me to render such a lengthy argument. Their Lordships' zeal to do justice and leaving no stone unturned in digging out the truth and completing the Herculean task of preparing the legendary Judgments in 32 volumes containing 8128 pages within a record time of less than two months is indeed praiseworthy .

I would fail in my duty if I do not appreciate the composite culture, etiquette, cordiality and hospitality of the Lucknow people shown to me not only by Ld. Advocates who were conducting proceedings for their respective Hindu parties but also by Janab Zafaryab Jilani and Janab M.A. Siddiqui Ld. Advocates who were conducting proceedings for their respective Muslim parties as well as by common people like Dr. S.R. Imam who had nothing to do with that case.

I feel it my utmost duty to express my gratitude and indebtedness towards the writers, translators, editors and publishers whose works have been referred in this work.

At last but not the least I would like to thank Mr. Mahesh Kumar Rathi due to whose dedicated efforts my argument is being published.

P N Mishra

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PREFACE

नमोऽस्तु रामाय सलक्ष्मणाय देव्यै च तस्यै जनकात्मजायै।
नमोऽस्तु रुद्रेन्द्रयमानिलेभ्यो नमोऽस्तु चन्द्रार्कमरुद्गणेभ्यः॥

The publication of the written arguments submitted by Shri Parmeshwar Nath Mishra (P.N. Mishra) before the Lucknow Bench of the Allahabad High Court in the famous Ram Janma Bhoomi-Babri Mosque case in the book form is going to be a momentous occasion in the legal history of India. I have closely interacted with Mr. Mishra for over two years and can therefore claim with certainty and authenticity that very few lawyers in the country can match him in his superb knowledge of the Civil and Constitution law as well as in the brilliant exposition of the case of the client before a court. Before the advent of Mr. Mishra in the court room of the Lucknow Bench of the Allahabad court at the fag end of the case, the Hindu parties were on the verge of losing the most important legally contested battle in the post independence India. He brilliantly argued the case for 24 days from 15th March, 2010 to 28th April 2010 on behalf of Akhil Bhartiya Sri Ram Janam Bhoomi Punarudhar Samiti established by His Holiness Jagadguru Shankaracharya Swami Swaroopanand Saraswati Maharaj and turned the tide of the litigation by the time he concluded his arguments. In the legal battle-field he stood like a colossal and dwarfed all those legal luminaries who argued the case for either side of the dispute. It was a treat to the ears to hear his forceful arguments which never faltered even in midst of an adverse situation of being confronted with a very serious question of law in the court.

It was just Almighty's grace that our meeting took place and Mr. Mishra was destined to lead the case to the victory-post against all odds at their worst. In 2009 I was quite worried when I came to learn that the Hindus were going to lose the legal battle of the Ram Janma Bhumi. Then I called on H.H. Jagadguru Shankaracharya Shardamath-Dwarka & Jyotirmath-Badarikashram Maha-swami Swaroopanand Saraswati Maharaj in Calcutta in August, 2009 and placed my deep concern before him. After careful thought and serious deliberation His Holiness called Shri P.N. Mishra and requested him to take up this onerous responsibility. Thereafter Mr. Mishra concentrated on the case for eight months and prepared his brief brilliantly. He was a confident commander of immense valour in the legal battle and I just a pilgrim who could contribute him in the field of history. Mishra's preparations for the case were perfect. His superb scholarship and vast experience were great assets. His arguments on civil and constitutional law were expectedly magnificent but his explanation of the Waqf law was admittedly amazing. All the three Judges of the High Court had highest regard for him and heard his argument with apt attention. Arguing a case full day for 24 days in the High Court requires the preparedness and perseverance of a pilgrim set for all four dhams as well as an oratory skill and persuasiveness of an advocate of all times like Bhulabhai Desai. His citing of 207 judgments ranging from 1836 AD to 2009 AD, a period of 175 years; 125 reference books and 23 Statues in a single case and that, too, from the one defendant's side will be some sort of record. All this resulted in a favourable verdict on 30th September, 2010.

After having seen Mr. Mishra arguing the case in the court my regret for not completing graduation in law ended because I was repenting for long that had I

been a law graduate I could have argued the case. But now with certainty I can claim that no lawyer in the country could have argued the case in a superior way and it was Mr. Mishra's arguments which were largely responsible for such an outstanding outcome. This irrefutable fact is best reflected in the Judgment of Allahabad High Court wherein his arguments have been referred to almost 200 times; whereas other lawyers' names from the Hindu side hardly find mention 20 to 30 times. But it is an irony that Mr. Mishra who, like Sachin Tendulkar, scored 200 runs and remained not out, has not got the due recognition in the nation and those who did score 20 to 30 runs are claiming to be champions. History is delayed at times but truth triumphs always.

I hope that by publication of this book the country will be familiar with the merit and achievement of one of its best legal luminaries. I wish him grand success in all spheres of life and proclaim in the words of Rashtra Kavi Ram Dhari Singh Dinkar.

सेनानी करो प्रयाण अभय
भावी इतिहास तुम्हारा है।
ये नखत अमा के मिटते हैं,
सारा आकाश तुम्हारा है।

- Acharya Kishore Kunal, IPS (Rtd.)
President
Bihar State Board of Religious Trusts, Patna
and
a former Vice Chancellor, K.S.D. Sanskrit University, Bihar.

PUBLISHERS NOTE

It is a delight to listen to Shri P N Mishra when he expounds the Ram Janambhoomi – Babri Masjid dispute.

Using his formidable intellect, he can quote from memory the year of all major events related to the Ram mandir down the centuries, edicts and “firmans” of the various Mughal Emperors travelers records of various Europeans, word to word quotes from the Gazetteers of the British period etc. to make his point. He states the actual historical facts with such clarity of thought and simple language that one feels wondering whether one is talking to a lawyer or a historian!

Some people say that Mr. Mishra's tide turning argument in the Ram Janambhoomi-Babri Masjid case forms the epicenter of the historical Judgment dated 30th September 2010 passed in O.O.S. No.1, 3, 4 & 5 of 1989 by the Special Full Bench of the Hon'ble Allahabad High Court, Lucknow Bench.

This book contains Shri P N Misra's, arguments made at the aforesaid Lucknow bench.

Those who happened to be present there have said that Shri. P N Misra's oratory was of the highest order and he had taken great care to marshal all the facts about Applicability of British law, Constitutional law, Muslim-law, Hindu-law. Law of Limitations, Principle of Estoppels, Law of Adverse Possession, Law of waiver and showed his versatility by being able to quote verses from Islamic books and the Shastras at the same time.

Some Jurist and Ld. Advocates have compared his argument with that of Shri Bhulabhai Desai's argument made in historical Azad Hind Fauz Trial of Red Fort, Delhi which was published 65 years back with the title “Subject People's Right to Fight for Freedom.”

The author has deemed it necessary to list the nearly 207 Case laws cited by him, 23 Statutes, and nearly 125 reference books which he had relied upon in his argument. For the benefit of the general public he has also summarized the dispute down the ages in a ten sheet annexure.

We have spent considerable time and effort in the preparation of this book and yet some faults are still likely to occur because of oversight. We apologize for the same and request the readers to point them out to us, so that the same may be rectified in subsequent editions. Comments and feedback may be mailed to accurateprinters@gmail.com.

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SRI RAM JANMA BHOOMI THROUGH AGES

Treta Yuga (21, 63, 102 B.C. -8,67,102 B.C.) : The Holy Sacred Scripture of the Hindus Srimad-Valmiki Ramayana reveals that in the 'Astapadakra' i.e. octagonal like a dice-board city of Ayodhya the Lord of Universe Sri Ram appeared in the Palace of mother Sri Kausalya as also that inside said palace there was a temple and an Idol of the Lord of Universe Sri Vishnu at least at the time of pronouncement of the date of coronation of the Lord of Universe Sri Rama . The Almighty's creation Holy Sacred Code of Sri Atharvaveda tells that in the centre of Octagonal nine doored city of Ayodhya there is a Tri-domed abode of the Lord of Universe.

Dwapar Yuga (8, 67,102 B.C.-3,102 B.C.) :The Holy Sacred Scripture of the Hindus Sri Skandapuram describing about 10 prominent Temples of Ayodhya commands that the devotees to visit Ayodhya and after taking bath in Sarayu to visit Sri Ramjanambhumi, the place where Supreme Brahma immutable Rama who killed Ravana was borne to have its darshan as by doing so one get salvation and benefits which are obtained of visiting of all Tirthas, performance of Rajsuya Yajnas, Agnihotra sacrifices as well as gifting of thousands of tawny-coloured cows, by seeing a man observing the Holy right particularly in the place of birth he obtains the merit of the holy- men endowed with devotion to mother and father as well as preceptors. Another Holy Sacred Scripture of the Hindus Sri Narsingh Puran says that the systematic worship of Lord Vishnu is done in fire, sun, heart, sthandil (altar) and in idol. Lord Vishnu is omnipresent and His worship in altar and idols is the best. Said Scriptures says that since the age of Sage Narada i.e. Treta-yuga this tradition of having darshan and performing religious practices and rituals at Sri Ramjanambhumi is being followed by the devotees.

629A.D.-645 A.D.: The Chinese Traveler Yuan Chwang recorded existence of Ten prominent Deva Temple of the Hindus in Ayodhya which shows that the prominent Temples described in Sri Skandapuram including the Sri Ramjanamsthan Temple were still in existence during the Ayodhya visit of Yuan Chwang.

12th Century A.D.: From the Inscription of Ayushyachandra, the Successor of king Meghasuta who obtained the Lordship of Saketa-mandal by the grace of Superior Lord of the Earth Govindachandra, king of Gahadwal Dynasty had erected a temple of Sri Vaishnuhari at the site in dispute as said inscription was recovered from the ruins of the disputed structure and site.

1526A.D.- 1530 A.D.: In his memoirs Babur-Nama Babar did not record any entry to show that there was fighting between him and the then Ruller of Ayodhya or to show under his order any mosque was erected in Ayodhya. In his memoirs Babur has mentioned name of the places and nature of constructions carried on at such places but he has not mentioned Ayodhya and Babri mosque. In 935 A.H. itself Babur remembered that

construction works were going on in Dhulpur and Agra but did not mention construction of Baburi Mosque at Ayodhya.

1556 A.D.- 1605 A.D.: During the reign of Akbar, the Great Princess Gul-Badan Begam, the daughter of the Emperor Babur wrote 'Humayun-Nama' wherein she has enumerated several places where constructions were carried out by Emperor Babar wherein Ayodhya and Baburi Mosque did not find place. In A-in-I Akbari, the Gazetteer of the Kingdom of Emperor Akbar Emperor's close confidant and an erudite scholar Abul Fazl Allami gives very minute and microscopic account of Ajodhya and records that Ajodhya is esteemed one of the holiest places of antiquity and was the residence of Ramchandra in the Treta age. He further records that near the city there were two tombs of six and seven yards in length alleged to be of Seth and the Prophet Job. He also records the presence of the tomb of Kabir at Ratanpur as well as graves of the Salar Masud and Rajab Salar located in Bahraich; but he did not mention existence of Babri Mosque or any other Mosque in Ayodhya. A-in-I Akbari describing Ten-incarnations of the Lord of Universe Sri Vishnu, records that Sri Rama was born in the city of Ayodhya on 9th day of bright half of Chaitra. A-in-I Akbari enumerating sacred places of pilgrimage of the Hindus records that in Ajodhya on the birth day of the Lord of Universe Sri Rama a great religious festival was held in those days. During this period the Sacred Religious book of the Hindus 'Sri Ramcharitmanas' was compiled by Sri Goswami Tulasidas wherein it has been described that for the sake of Brahmans, Cows, Gods and Saints the Lord of Universe Sri Vishnu assumed a form of Infant Sri Ram in the Palace of mother Sri Kauslya in Ayodhya City on 9th Day of the bright-half of the month of Chaitra and on this day of Sri Rama's birth the presiding spirits of all holy places flock there – so declare the Vedas – and as well as demons, nagas, birds, human beings, sages and gods come and pay their homage to the Lord and wisemen celebrate the great birthday festival and sing the sweet glory of Sri Rama.

1605 A.D.-1627 A.D.: William Finch who travelled India from 1608 A.D. to 1611 A.D. during the reign of Emperor Nuruddin Mohammad Jahangir and whose account has been published in the book "Early Travels in India 1583 – 1619 by William Foster p.176" has written that he saw the Hindus visiting the Birth Place of the Lord of Universe Sri Ram Chandra in Ramkot in the city of Ayodhya and also saw Brahmans noting down names of the visitors to that sacred place which tradition was coming down for Lakhs of years. During this period in his book "Tarikh-e-Farista" English translation whereof is titled as "History Of The Rise Of The Mahomedan Power In India till the year A.D. 1612" Mahomed Kasim Ferishta enumerates the mosques which were rebuilt and repaired by the Emperor Babur where in there is no mention of Babari Mosque.

1658 A.D. – 1707 A.D.: During the reign Aurangzeb Niccolao Manucci who was worked as commander in the Army of the Mughal Emperor Aurangzeb and later on accompanied Raja Jai Singh during his campaign against

Chhatrapati Maharajadhiraj Shivaji in between March 1664 to July 1665. After the death of Raja Jai Singh in or about 1678 he came in service of Prince Shah Alam I, who later on succeeded emperor Aurangzeb, as his physician and ultimately left Mughal dominion in 1686. In his book "Storia do Mogor" or Mogul India 1653 – 1708 Manucci records the facts that several temples including the four Chief temples of the Hindus at Ayodhya, Kashi (Varanasi), Mathura and Hardwar were demolished by the Emperor Aurangzeb but shortly thereafter Hindus thronged to their those sacred sites and started worshipping as they were doing in past.

1770 A.D. : In his book *Description Historique Et Geographique De l' Inde*, Joseph Tieffenthaler who visited Sri Ramjanmasthan in the year 1770 A.D. during the reign of Emperor Shah Alam II (1759-1806 A.D.) evidenced the performance of customary rites by the Hindus in the central & left Halls of the Sri Ramjanmasthan Temple, Ajodhya in India. Tieffenthaler says that there was a Vedi i.e. Sthandil inside the said Temple which was being worshipped by the Devotees by prostrating and circumambulating it thrice, but he did not mention offering of prayer therein by the Muslims.

1828 A.D. : The *East India Gazetteer of Hindustan* of Walter Hamilton, 2nd Edition first published in 1828 A.D., records that the remains of the ancient city of Oude (Ayodhya), the Capital of Great Rama was still in existence wherein reputed sites of temples dedicated to Sri Rama, Sri Seeta, Lakshman and Hanuman are located and; the pilgrims who perform the pilgrimage to Ayodhya they walk round the temples and idols, bathe in holy pools, and perform the customary ceremonies.

13.02.1856 A.D.: Oudh was annexed to the Territories of the East India Company.

1858 A.D. : The *Gazetteer of the Territories under the Government of East India Company and of the Native States on the continents of India* by Edward Thornton, first published in 1858 records that on the right bank of the Ghogra, are extensive ruins, about 2000 years old said to be those of the forts of Rama, king of Oude, hero of the Ramayana, and otherwise highly celebrated in the mythological and romantic legends of India; the ruins still bear the name of Ramgurh, "or of fort of Rama"; according to native tradition temples thereon were demolished by Aurangzebe, who built a mosque on part of the site, but an inscription on the wall of the mosque, falsify the tradition as it attributes work to the conqueror Baber. A quadrangular coffer of stone, whitewashed five ells long, 4 broad, and protruding 5 or 6 inches above ground, is pointed out as the cradle in which Rama was born as the 7th Avatar of Vishnoo; and is accordingly abundantly honoured by the pilgrimages and devotions of the HindO.O.S.. The Gazetteer has recorded two sources to ascertain the person who was responsible for damaging the Temple and converting the same into a mosque firstly, tradition according to it was Aurangzebe and secondly, an inscription according to which it was Babar. The compiler recording both sources gave weightage to the information of the alleged inscription.

- 1858 A.D.: One Hindu Saint Neehang Singh occupied the alleged Janmasthan mosque and in the centre of the Baburi Mosque built an altar and installed idol. Inside the walls of the said structure he wrote "Ram Ram" by charcoal here and there and started worshipping the deity by way of offering fire sacrifices, oil lamps. Stating aforesaid facts vide application dated 30th November, 1858 one Syed Muhammad claiming to be Khatib and muazzim of the Baburi mosque prayed to the Authorities for removal of the Hindu Saint, Idols as well as washing out the names i.e. Ram Ram from the place where earlier from hundreds of years symbol of Hindu was lying down and Hindus used to worship. On being asked to leave the place by the Officer-in-charge of local Police Station said Saint refused to vacate the place stating that the said place was of Almighty. There is nothing to suggest removal of said saint and /or removal of Idol.
- 15.03.1859 A.D. : Lord Canning issued proclamation and thereby confiscated all proprietary rights in the soil of the Oudh Province.
- 1861 A.D.: In the first settlement of 1861 plot no.163 i.e. the suit property was recorded as "Abadi Janam Asthan" owned by "Sarkar Bahadur" .
- 1868 - 1873 A.D.: Alleged khatib and muezzin admitting the fact of presence of idols prayed before the Authorities for removal of idols.
- 1870 A.D.: Mr. P. Carnegie who was officiating Deputy Commissioner of Faizabad in 1817 has in his book "Historical Sketch District Faizabad with the Old Capitals of Ayodhya and Faizabad" has mentioned that upto annexation of Oudh the Hindus used to worship in the Mosque-Temple at the Janam Sthan.
- 1877-78 A.D.: Gazetteer of the Province of Oudh first published in 1877-78 records that Ajodhya is to the Hindus what Mecca is to the Mohammadans and Jerusalem to the Jews. Ajodhya its eponymous city was the capital of incarnate deity and perfect man, Rama, history is more nearly concerned with the influence which the story of his life still has on the moral and religious beliefs of a great people, and the enthusiasm which makes his birth-place the most highly venerated of the sacred places to which its pilgrims crowd. The Janamsthan marks the place where Ram Chander was born. The Gazetteer records that Ramkot, the stronghold of Ram Chandar covered a large extent of ground, and, according to ancient manuscripts, it was surrounded by 20 Bastions, each of which was commanded by one of Ram's famous general after whom they took the names by which they are still known. In course of great rapture between the Hindus and the Muslims, IO.O.S.ing possession of Sri Ramjanmsthan for few days ultimately the Hindus re-occupied their said sacred shrine suffering 11 casualties and inflicting 75 casualties on Muslim-side. The Gazetteer further records that up to that time the Hindus used to worship in the mosque-temple. Since British rule a railing had been put up to prevent the disputes. There were 8 Royal Mansions where dwelt Sri Ram, an incarnation, his father Sri Dasrath and Sri Dasarath's wives. in all India, perhaps except the Jagannath

festival and that at Hardwar, there was none to equal the Ram Naumi celebration at Ajodhya. At the Ram Naumi festival 5,00,000 people assemble in honour of ancient King Ramchander.

- 1880 A.D.: The report of the A.F. Millett, the officiating settlement officer of the Faizabad district has recorded in his report that prior to commencement of British Rule Oudh the Hindus used to pray in the Mosque-Temple.
- 1910 A.D.: In his book "History of Indian and Eastern Architecture" 1st published 1910 in its Chapter X 'Mughal Architecture' James Fergusson has observed that no building known to be built by Babur has yet been identified in India.
- 27.03.1934: Alleged structure was demolished in riot and later on re-erected/repared by the Muslim contractor appointed by the Government it is that contractor who fixed inscriptions on the re-built building with foot note below the restored epigraph in Urdu recording the fate of the original inscription as follows: "On 27th March, 1934 the Hindus-after demolishing Masjid took away the original inscription which was dexterously re-built by the contractor Tehwoor Khan."
- 23.12.1949: F.I.R. was lodged at Police Station Ayodhya alleging that in the intervening nights of 22nd and 23rd December, 1949 in the Disputed Structure Idol of Sri Ramchandrajī was placed.
- 29.12.1949: Disputed Structure was attached by the Additional City Magistrate Faizabad. That vide his order dated 29-12-1949 in a proceeding drawn under Section 145 Criminal Procedure code, 1898 and appointed Priya Dutta as the Receiver.
- 05.01.1950: The Receiver, Priya Dutta appointed assumed the charge of the disputed structure.
- 16.01.1950: Regular Suit No. 2 of 1950/O.O. S. No.1 of 1989 was filed in the Court of Civil Judge Faizabad by one Gopal Singh Visharad against Zahoor Ahamad and 10 (ten) others inter alia praying for a Decree of declaration to the effect that the plaintiff was entitled to perform Puja and Darshan by going near Bhagwan Sri Ramchandra etc. installed at Asthan Janam Bhumi without any hindrance from the Defendants. In the said suit a prayer for permanent injunction restraining the State of Uttar Pradesh, Deputy Commissioner Faizabad, Superintendent of Police Faizabad as well as Sunni Central Waqfs Board Uttar Pradesh from removing the Idols of Bhagwan Sri Ram Chandra from the suit property. And by vide order dated 16th of January, 1950 as modified by order dated 19th January, 1950 the Ld. Court was pleased to restrain the parties by means of temporary injunction from removing the Idols in question from the site indispute and from interfering with Puja etc.. An interim injunction in the meanwhile, as prayed, was granted.
- 19.01.1950: The Civil Judge modified the injunction order dated 16.1.1950, on an application filed on behalf of defendants no. 7 to 9, in the following manner: "The opposite parties are hereby restrained by means of a temporary injunction to refrain from removing the idols in question

from the site in dispute and from interfering with "Puja" etc. as at present carried on. The order dated 16.01.1950 stands modified accordingly."

25.05.1950: On 25.05.1950 Shri Shiv Shanker Lal, Commissioner submitted his report and map in Regular Suit No.1 of 1950 / O.O.S. No 1 of 1989.

05.12.1950: Regular Suit No. 26 of 1950/O.O. S. No.2 of 1989 was filed in the Court of Civil Judge Faizabad by one Param Hans Ram Chandra Das against Zahoor Ahamad and 10(ten) others inter alia praying for a Decree of declaration to the effect that the plaintiff was entitled to perform Puja and Darshan according to customary rights without any check, obstruction or interference by going near Bhagwan Sri Ramchandra, etc. installed at Asthan Janam Bhumi. In the said suit a prayer for permanent injunction restraining the defendants from removing the Idols of Bhagwan Sri Ram Chandra from the suit property.

N.B. The said suit was withdrawn by the plaintiff in the year 1992.

03.03.1951: The Interim Injunction Order dated 16.01.1950 as modified vide order dated 19.01.1950 passed in Regular Suit No. 26 of 1950/O.O. S. No.2 of 1989 was extended till disposal of the said suit.

17.12.1959: Nirmohi Akhara and its Mahant filed Regular Suit No.26 of 1959/O.O.S. No. 3 of 1989 against the then Receiver Babu Priya Dutt Ram and 10(ten) others seeking a decree of removal of the said Receiver and delivering the charge and management of Temple with articles to the Plaintiffs. In this suit no prayer for interim relief was made.

18.12.1961: Sunni Central Wakfs of Board, U.P. and 9(Nine) others filed Regular Suit No. 12 of 1961/O.O.S. No. 4 of 1989 against Sri Gopal Singh Visharad and 12(Twelve)others inter alia praying for a decree of declaration that the suit property is public mosque commonly known as 'Babari Masjid' as also for a decree for delivery of possession of the mosque by removal of the Idols and other articles placed therein by the Hindus as objects of their worship. In this suit it has also been prayed that the Statutory Receiver be commanded to hand over the property in dispute to the plaintiffs by removing the unauthorised structure erected there on.

23.04.1962/28.05.1962: The Government of Uttar Pradesh through its officials being the defendant nos. 6 to 8 in Regular Suit No. 12 of 1961 filed an application inter alia stating that the Government is not interested in the properties in dispute and as such do not propose to contest the suit.

06.01.1964: On 06.01.1964 all the parties in Regular Suit Nos. 1 of 1950, 25 of 1950, 26 of 1959 and 12 of 1961 re-registered as O.O.S. Nos. 1, 2, 3 and 4 of 1989 filed joint application requesting the trial court to consolidate the aforesaid suits and hear those matters collectively and jointly. The trial court allowed the application with the consent of learned counsels for the parties on the same date consolidating all the suits and to treat Regular Suit No. 12 of 1961 as leading case.

- 05.03.1964: Learned Civil Judge framed 16 issues .
- 17.07.1965: Learned Civil Judge framed an additional issue being issue no.17.
- 21.04.1966: As agreed by learned counsels for the parties, issue No. 17 i.e. "Whether a valid notification under Section 5(1) of the U.P. Muslim Waqf Act No. XIII of 1936 relating to the property in suit was ever done? If so, its effect?" was taken up as a "primary preliminary issue" and vide judgment dated 21.04.1966 the Civil Judge, decided the same against plaintiffs (Suit 4) and in favour of the defendants therein. The Civil Judge, after reading the definition of 'Waqf' and 'Waqif' as contained in Section 3(1) of 1936 Act, held that whenever the word 'waqf' is conveyed to any person, it must necessarily convey simultaneously the idea or description or a tangible connotation about the existence of "any property" covered or included in the 'Waqf'. Meaning thereby, if someone wants another to know that a particular property is waqf, it would be necessary for him to mention simultaneously the description of atleast tangible connotation about the identity of the property of the waqf. After perusing the alleged notification dated 26.2.1944 said to have been published under Section 5 of 1936 Act, the Court found that Item 26, at which the alleged Waqf of Waqif Badshah Babar was mentioned, was blank in its last column and consequently it did not give any idea of the property of which Waqf was created. It held that the alleged Government notification at Item no. 26 was meaningless.
- 01.02.1986 : The then Ld. District Judge of Faizabad vide his order directed to open locks of the building in dispute which was complied with and the Hindus started worshipping by going near to the deities.
- 01.07.1989: Regular Suit No. 236 of 1989/O.O.S. No. 5 of 1989 was filed by Sri Deoki Nandan Agarwal for self and as next friend of Bhagwan Sri Ramlala Virajman at Sri Ram Janam Bhoomi as well as of Asthan Sri Ram Janam Bhoomi, Ayodhya against Sri Rajendra Singh and 26 others including Nirmohi Akhara as Defendant no.3, Sunni Central Wakfs Board of Uttar Pradesh as defendant no.4 and Sri Ramesh Chandra Tripathi as defendant no. 17 inter alia praying for a decree of declaration that the entire premises of Sri Rama Janma Bhumi at Ayodhya belong to the plaintiff Deities with a further prayer for perpetual injunction against the Defendants prohibiting them from interfering with, or raising any objection to, or placing any obstruction in the construction of new Temple building at Sri Rama Janma Bhumi, Ayodhya.
- 10.07.1989: The Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, Lucknow on application dated 16th December, 1987 of the State of Uttar Pradesh made under Section 24 read with Section 151 of the Code of Civil Procedure, 1908 passed Order and thereby withdrew all the suits to the said Hon'ble High Court with a direction that the said suits be heard by a Special Bench of Three Hon'ble Judges.
- 21.07.1989: The Hon'ble Chief justice of the Allahabad High Court constituted a Special Bench consisting of three Hon'ble Judges.

- 23.10.1989: Akhil Bhartiya Sri Ram Janam Bhoomi Punarudhar Samiti founded by His Holiness Jagadguru Shankaracharya of Sharda Math-Dwarka and Jyotirmath-Badarikashram through its Convener Madan Mohan Gupta was added as defendant no.20 in O.O.S. No.4 of 1989.
- 05.11.1989: The defendant No. 20 filed Written Statement in O.O.S. No. 4 of 1989 in the High Court inter alia denying all the allegations contained in the Plaint of the said Suit and taking additional pleas that the birthplace of Sri Ram in Ayodhya is being worshipped for the last many thousand years and Hindus believe divine presence at Ram Janma Bhoomi and believe in receiving bounties and blessing of the Deity the temple was not demolished by the Babur but was desecrated by the Aurangzeb but the Hindus continue to worship therein, the building having images and other objects of worships of Hindus is not a mosque.
- 15.04.1992: The High Court allowed the defendants nos. 4, 5, 6, 22, 24, 25, 26 and 27 to defend O.O.S. No. 5 as representatives of Muslim Community.
- 06.12.1992: The disputed structure was demolished and temporary structure was created wherein the worship and puja of infant Lord Sri Ram and other deities continue to be worshipped by the Hindus.
- 03.04.1993: The Acquisition of Certain Area of Ayodhya Act, 1993 was published in Gazette of India whereby 112 Bigha 02 Biswa 13 Biswansi land corresponding to 70.08281 Acres in area including the Suit premises comprised in Najul Plot No. 583 corresponding to Revenue Plot Nos. 163 of the first settlement of 1861 was acquired by the Central Government inter alia with aim and object to maintain public order and to promote communal harmony between different communities and the spirit of brotherhood amongst the people of India and to facilitate erection of a temple, a mosque, amenities for pilgrims, establishment of library etc. The immediate result of the said enactment was that all the four suits pending before this Court, by operation of law, stood abated.
- 07.01.1993: The President of India in the meantime also made a special reference to the Apex Court under Article 143(1) of the Constitution of India on the following question. "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood."
- 24.10.1994: Writ Petitions challenging Vires of said Ayodhya Act of 1993 were decided by the Hon'ble Apex Court collectively along with the reference made under Article 143 (1) of the Constitution vide its judgment dated 24.10.1994, passed in M. Ismail Faruqui Dr. and others versus Union of India and others etc. etc. reported in AIR 1995 SC 605. The Hon'ble Supreme Court vide its said Judgment upheld the aforesaid acquisition excluding the area of Inner and Outer Courtyard of RJB i.e. a piece of land measuring 130' x 80' = 10,400 Sq. ft. which includes inner courtyard of 80'x40' = 3200 Sq.ft. only inter alia laying down principle of law that "The protection under Arts. 25 and 26 of the Constitution

is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of the religion. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right." The Hon'ble Apex Court interalia concluding that " Section 8 of the Act is meant for payment of compensation to owners of the property vesting absolutely in the Central Government, the title to which is not in dispute being in excess of the disputed area which alone is the subject matter of the revived suits. It does not apply to the disputed area, title to which has to be adjudicated in the suits and in respect of which the Central Government is merely the statutory receiver as indicated, with the duty to restore it to the owner in terms of the adjudication made in the suits. The challenge to acquisition of any part of the adjacent area on the ground that it is unnecessary for achieving the professed objective of settling the long standing dispute cannot be examined at this stage. However, the area found to be superfluous on the exact area needed for the purpose being determined on adjudication of the dispute, must be restored to the undisputed owners." The Apex Court also allowed the parties to seek amendment in their pleadings, a number of applications were filed seeking amendments in the pleadings and also for impleadment of Union of India etc. This Court, by various orders, after hearing the parties, allowed necessary amendments as found fit and rejected the rest.

- 24.07.1996: Consolidated hearing of the Suit nos. O.O.S. 1 of 1989, O.O.S. No. 3 of 1989, O.O.S. No. 4 of 1989 and O.O.S. No. 5 of 1989 was started.
- 01.08.2002: The High Court took a view that Archaeological Evidence will be of importance to decide the issue as to whether there was any temple / structure which was demolished and mosque was constructed on the disputed site and directed the Archeological Survey of India to get the disputed site surveyed by Ground Penetrating Radar and Geo-radiology and to submit report.
- 17.02.2003: The ASI submitted GPR Survey Report which was carried out by Tojo-Vikas International (Pvt.) Ltd. from 30.12.2002 to 17.01.2003 wherefrom it was reflected that a variety of anomalies ranging from 0.50 to 5.5 metres in depth could be associated with ancient and contemporaneous structures such as pillars, foundations walls slab flooring, extending over a large portion of the site.

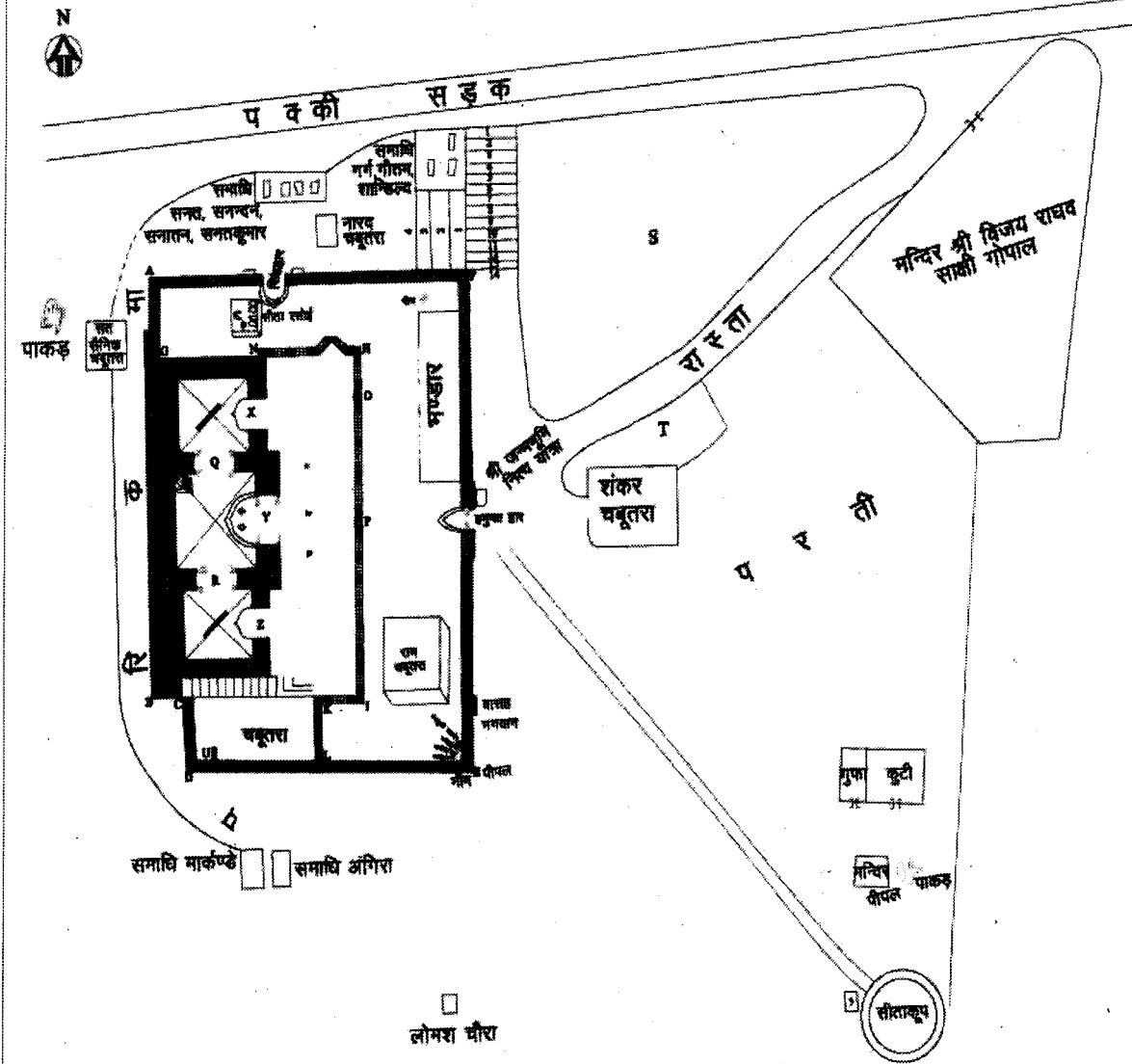
- 05.03.2003: The High Court directed ASI to excavate the disputed site.
- 12.03.2003-07.08.2003: The ASI carried out excavation at the disputed site of Rama Janmabhumi – Babri Masjid as per direction of the High Court.
- 22.08.2003: The ASI submitted Excavation Report along with several records before the High Court inter alia containing its conclusive finding that 'viewing in totality and taking into account the archeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patterns, amalaka, kapotapali doorjamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having pranala (waterchute) in the north, fifty pillar bases in association of the huge structure, are indicative of remains which are distinctive features found associated with the temples of north India.'
- 23.03.2007: In course of Consolidated hearing of the Suit nos. O.O.S. 1 of 1989, O.O.S. No. 3 of 1989, O.O.S. No. 4 of 1989 and O.O.S. No. 5 of 1989 from 24.07.1996 to 23.03.2007 in total 94 Witnesses gave their respective statements and were Cross-Examined by the Counsels of the contesting parties at length which have been recorded in about 13991 pages.
- 27.04.2007-27.08.2009: After conclusion of the evidences final arguments were started on and from 27th April 2007 before the Special Full Bench comprising the Hon'ble Justice Rafat Alam, the Hon'ble Justice Dharam Veer Sharma and the Hon'ble Justice Om Prakash Srivastava JJ. The said Hon'ble Bench heard the arguments of the Ld. Advocates from 27.04.2007 to 27.08.2009 but due to retirement of the Hon'ble Justice O.P. Srivastava J. as then His Lordship was as also due to elevation of the Hon'ble Justice Rafat Alam J. as Hon'ble Chief Justice of the Hon'ble Madhya Pradesh High Court the said bench became non-existent.
- 11.01.2010-26.07.2010: During this period the re-constituted Special Full Bench comprising of the Hon'ble Justice Sibghat Ulla Khan J, the Hon'ble Justice Sudhir Agarwal and the Hon'ble Justice Dharma Veer Sharma, JJ. heard arguments of the Ld. Counsels & Advocates for 90 working days and, Leading Counsel of defendant No.20 herein Mr. P.N. Mishra, assisted by Susree Ranjana Agnihotri, Ld. Advocate on record argued for 24 working days citing/referring about 300 judgments and reference books as well as Statutes and also submitted his written argument in two volumes of 516 pages.
- 30.09.2010: The High Court delivered the Judgment wherein the Hon'ble Justice S.U.Khan J. and The Hon'ble Justice Sudhir Agarwal, J. forming majority Decreed the O.O.S. No. 1 of 1989 in part while the Hon'ble Justice D.V.Sharma, J. forming minority dismissed said O.O.S. No. 1 of 1989. The Hon'ble Justice Sudhir Agarwal, J. and the Hon'ble

Justice D.V. Sharma. J. forming majority dismissed O.O.S. No.3 of 1989 and O.O.S.No.4 of 1989 while the Hon'ble Justice S.U.Khan, J. forming minority decreed the aforesaid suit in part. The Hon'ble Justice S.U.Khan J. and the Hon'ble Justice Sudhir Agarwal, J. forming majority Decreed the O.O.S. No. 5 of 1989 in part while the Hon'ble Justice D.V.Sharma forming minority Decreed said O.O.S. No. 5 of 1989 in full. The Hon'ble Justice S.U. Khan and the Hon'ble Justice Sudhir Agarwal, JJ. forming majority decreeing the O.O.S.No.5 of 1989 in part declared that the three set of parties i.e. Muslims, Hindus and Nirmohi Akhara are joint title holder of the suit property known as Sri Ram Janma Bhumi and Babri Masjid, Ayodhya to the extent of one-third share to each of the parties for using and managing the same for worshipping and , the Hon'ble Justice D.V. Sharma, J. forming minority decreed the O.O.S.No.5 of 1989 and declared that the entire premises of Sri Ram Janma Bhumi at Ayodhya as described and delineated in Annexure no.1 and 2 of the plaint belonged to the plaintiff No.1 and 2, the deities and restrained the defendants permanently from interfering with or raising any objection to, or placing any obstruction in the construction of the temple at Sri Ram Janma Bhumi, Ayodhya at the site referred to in the plaint.

APPENDIX-2C

SHOWING THE BUILDING IN THE SUIT WITH ITS LOCALITY

**BASED ON THE PLAN NO. 01 & PLAN NO.02, PREPARED BY SHRI SHIV SHANKAR LAL PLEADER, COMMISSIONER, DATED 25.05.1950
IN THE COURT OF THE CIVIL JUDGE FAIZABAD REGULAR SUIT NO.2 OF 1950 /SHRI GOPAL SINGH VISHARAD V/S ZAHUR AHMAD AND OTHERS.**



A,B,C,D,E,F - Building in suit No.2 of 1950

G,H,J,K,L,D,C,B - Inner Building.

N,H,J,K

- Walls enclosing Pucca court-
- Yard in front of inner (main)-
- building.

O&P - Iron Bar Gates.

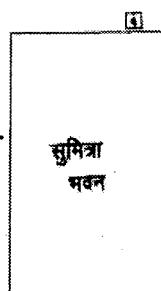
U - Pucca Platform having a urinal.

X,Y,Z - Arched Gates.

Q&R - Huts and Dhunis of Sadhus.

a,b,c,d,e,f,g

h,i,j,k,l,m,n - Kasauti Pillars

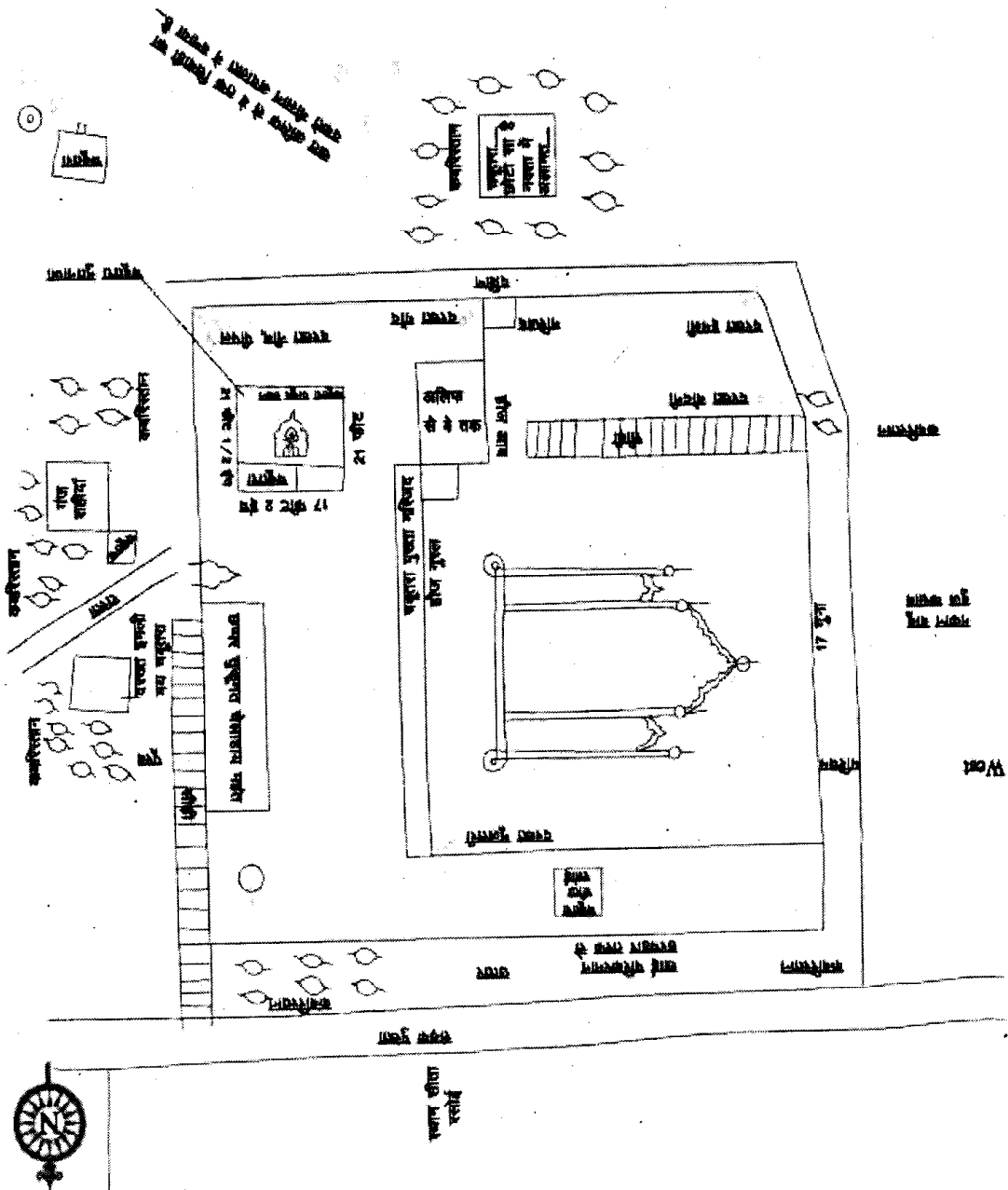


**तुलसी
घीरा**

40 0 40 Feet

Scale 1" = 40'-0"

पुनर्विचार-पृ. 25. आयोगपत्र 1/80



INDEX

PART	CONTENT	PAGES
I	Sri Ramajanmasthan evident from the holy scriptures.	1-8
II	Svyambhu symbols of deities do not need Pratistha while Pratistha of manmade symbols of deities can be done by single Mantra of the divine Yajurved.	9-15
III	Adverse possession of Debutter property is impermissible in Hindu Law.	16-28
IV	Debutter property-ceremony of dedication not essential, dedication is always for invisible power who is juridical entity idol whereof is only manifestation, destruction of idol does not destroy endowment, deity cannot be shifted to other place, right of the idols, worshipers and sebaits' in respect of Debutter property.	29-36
V	Alleged inscriptions are false, fabricated, forged, fictitious and were never fixed on Sri Ramjanamsthan Temple described in Complaint as Baburi mosque.	37-53
VI	Authentic historical books, Memoirs of Mughal Kings, Princess, their Commander, Gazetteers & Travellers' account did not prove of erection of alleged Babari mosque but prove existence Sri Ramjanmsthan & Temple thereon.	54-81
VII	There was no person named Mir Khan or Mir Baqi or Abdul Baqi or Abdul Baqi Isphahani associated with emperor Babur as such building of alleged Babari mosque at Sri Ramjanamsthan by such fictitious commander / minister / governor of the emperor in 923 A.H. (1516-17 A.D.), in 930 A.H. (1523-24 A.D.) and in 935 A.H. (1528-29 A.D.) cannot and does not arise at all.	82-84
VIII	There was no war in 935 AH (1528 AD) in Ayodhya nor the emperor Babur built graveyards or Mosque at Ramjanamsthan described as Babari Mosque in the complaint of the instant suit.	85-87
IX	Applicability of law for the time being in force in Oudh during Sultanate and Mughal period.	88-97
X	In 1526 A.D. when Babur became ruler of Delhi, Agra & Oudh defeating Sultan Ibrahim Lodi in the battle of Panipat these territories were comprised in Dar-ul-Islam.	98-99
XI	Transgression of divine law of <i>Shar</i> by an Islamic ruler as well as Muslims is impermissibility in Dar-ul-Islam.	100-106
XII	Law of adverse possession is not recognised by <i>Shar</i> and alien to it as such seeking declaration of a structure built over the religious place of the Hindus as a Mosque on ground of adverse possession is flagrant violation of Islamic law as such suit is liable to be dismissed.	107-112
XIII	Islam guarantees religious freedom & toleration and does not permit to usurp sacred religious place of others.	113-114

PART	CONTENT	PAGES
XIV	Freedom of religion & religious practices to Hindus under Islamic rule & Muslim Law was granted to the Hindus.	115-118
XV	Idolator Hindus were recognized as Zimmis by the great Imam Abu Haneef as such Emperor Babar being follower of said Imam's school had no right to erect mosque over Hindu Shrine.	119-120
XVI	Freedom of Religion subject to payment of Jeziyah, as Hindus were paying said protection tax it was duty of the Islamic Ruler and Army of Islam to protect Shrine and life of the Hindus.	121-125
XVII	According to the Holy Prophet in one land there cannot be two Qibalahs or Idgah & Mosque as such Sri Ramjanmasthan Temple and a Mosque can not co-exist in disputed site.	126-129
XVIII	Structure having Images/Idols and designed one cannot be a Masjid under law of <i>Shar</i> as such the disputed structure as it was can not be termed as a Mosque.	130-131
XIX	There can not be a mosque in a place surrounded by graves as facing towards graves Namaz can not be offered.	132-133
XX	In vicinity of bells there cannot be a Mosque because it is Revelation of the Holy Prophet that bell is abode of Saitan, contray to it bell is inebral part of 16 organs of religious Customs of Worship of the Hindus as such as all along bells remained in the disputed site it can't be a mosque.	134-136
XXI	As there was no provision of water for wadu in the Disputed Structure it can't be a Mosque but it was all along a Hindu Temple.	137-140
XXII	Wakif must be owner of the property for creating valid waqf as Emperor babur was not owner of the hindu Shrine Sri Ramajanmasthan he or his Commanders had no right to erect mosque and any building erected contrary to religious mandate of the Islam cannot be construed a mosque as such the disputed structure was all along a Hindu Temple & Sacred Shrine.	141-146
XXIII	The Hindu and the Muslim Kings were subject to law of their respective Dharma & Religion as such the Emperor Babar was also subject to law of Shar and his alleged action of erection of alleged Mosque if any done in transgrssion of said law is void.	147-153
XXIV	Relevant facts contained in Gazetteers are admissible evidence under the provisions of the Indian Evidence Act, 1872 as such the facts relied on from the Gazetteers referred earlier are admissible evidence.	154-171
XXV	Farman of the Emperor Shah Jahan held that the building over the land of a Temple is not a Mosque and owner of the temple is entitled for restoration of possession with liberty to Worship therein according to his own religion has force of law.	172-174
XXVI	Instant suit is barred by Section 87(1) of the Waqfs Act, 1995.	175-193

PART	CONTENT	PAGES
XXVII	Limitation to challenge Commissioner's report not applicable to stranger.	194-198
XXVIII	Admission of the Muslims that the Hindus were continuously worshipping at Sri Ramajanmasthan Temple and the Muslims were interrupting them only on fridays aided by the army of Nababs or the British Government and ultimately the Muslims discontinued their said interruption on 16.12.1949.	199-216
XXIX	The suit is barred by article 120 of the Indian Limitation Act, 1908.	217-227
XXX	Ingradients of adverse possession neither have been pleaded nor have been proved, Plaintiff can not be allowed to claim relief based on title under or through emperor Babur on one hand while on other hand seeking claim denying the title of said emperor moreover being inconsistent plea of adverse possession the instant suit is liable to be dismissed.	228-261
XXXI	The Plaintiffs can not be allowed to approbate and reprobate on one hand they are seeking declaration based on title while on other hand they are claiming relief based on adverse possession contrary to title as such the suit is liable to be dismissed.	262-265
XXXII	Burden of proof under section 101,102,103 and 110 of the indian evidence act, 1872 lies on the plaintiffs which they have failed to prove as such the instant suit is liable to be dismissed.	266-284
XXXIII	Excavation report of the Archaeological Survey of India being a scientific report of the experts against whom bias or malafide have not been proved is liable to be admitted and relied on as a piece of evidence.	285-317
XXXIV	As the disputed land is recorded as Nazul land and the Plaintiffs have failed to produce any regd. Lease Deed they cannot claim any relief based on title.	318-322
XXXV	The transferee High Court does not have more powers than those which, but for the transfer might have been exercised by the District Court.	323
XXXVI	Judicial pronouncements on Idol, symbols of Gods, dedication, Sebait, worshippers, Debutter property suits etc.	324-359
XXXVII	The Hindus have superior Fundamental Right than the Muslims under articles 25 & 26 of the Constitution of India for the reasons that performing customary rituals and offering service worship to the Lord of Universe to acquire merit and to get salvation as such it is integral part of Hindu Dharma & Religion in view whereof it is humbly submitted that the instant suit is liable to be dismissed with exemplary cost.	360-380

PART – I

SRI RAMAJANMASTHAN EVIDENT FROM THE HOLY SCRIPTURES

1. The Holy Scriptures of the *Sanatan Dharma* i.e. the *Hindu Dharma* namely: the Holy Divine *Srimad Atharvaved*, the Holy Scriptures *Srimad Skand-Puranam*, *Srimad Narsimha Puranam*, *Srimad Valmiki Ramayana* and; the Sacred Religious Book *Sri Ramacharitmanas* of Sri Goswami Tulsidas describe the Place of Birth of the Lord of Universe *Sri Rama* i.e. *Sri Ramajanmasthan* and Three-domed Temple lying thereon in the City of Ayodhya as Abode of *Brahma* (Almighty), the land wherefrom Lord of Universe *Sri Vishnu* the benefactor of *Kaushalya* appeared and on her prayer subsumed therein in invisible form leaving on *Sthandil* His Incarnation *Sri Ramlala* as His incarnate and; further say that *Sri Ramajanmasthan* is most sacred place only by seeing which the devotees acquire salvation and all those merits which can be acquired by visiting all other *Tirthas* and thereby said holy sacred Scriptures of the *Hindu Dharma* make performance of customary rites at *Sri Ramajanmasthan* integral part of *Hindu Dharma*.
2. The Holy Scriptures *Srimad Valmiki Ramayana* and *Srimad Skandpuranam* and the sacred book *Sri Ramacharitamanasa* respectively reveal presence of *Sri Vishnu's* Temple in the Apartment of Mother *Kaushalya*, temples of other Deities and tradition of pilgrimage thereto as well as celebrations of Birthday Festival at the Place of Birth of the Lord of Universe *Sri Ram* in Ayodhya right from the *Treta yuga*.
3. The Holy Spells 'Ken Suktam' of Divine *Srimad Artharv-veda* i.e. *Atharv-ved Samhita* 10.2.31-32 describes the three domed Temple at *Sri Ramajanmasthan* in Ayodhya as follows:

अष्टाचक्रा नवद्वारा देवानां पूरयोध्या। तस्यां हिरण्ययः कोशः स्वर्गो ज्योतिषावृतः॥३१॥
तस्मिन्हिरण्यये कोशे त्र्यरे त्रिप्रतिष्ठिते। तस्मिन्यद्यक्षमात्मन्वत्तद्वै ब्रह्मविदो विदुः॥३२॥
प्रभ्राजमानां हरिणीं यशंसा संपरीवृताम्। पुरं हिरण्ययीं ब्रह्मा विवेशापराजिताम्॥३३॥

"Ayodhya, the city of Gods is Octagonal (like Dice-board) and Nine-doored. In that golden sanctum encircled with radiance is abode of Deities.[31]

In the said tri-spoked tri-supported golden sanctum resides soul-possessing *Yaksha*, that verily the knowers of *Brahm* know.[32]

The *Brahm* entered in the resplendent, sin-destroying, golden unconquered city that was all surrounded with glory. [33]"

Be it mentioned herein that W.D. Whitney has translated these Holy Spells word by word which has made said translation obscure. For example he has translated word "Aashtachakra" as "eight wheeled" while "Aashtachakra" has been translated as "Ashtapadakara" by Sri Valmiki in *Ramayana* English translation whereof published by Sri Gita Press Gorakhpur is "like Dice Board" i.e. octagonal. W.D. Whitney has translated the word "Ayodhya" as "impregnable stronghold" while herein it has been used as proper noun which will become clear from the use of adjective "Aparajitam puram" for the city "Ayodhya". This Translation has been given based on Hindi Translation of Padmabhushan Dr. Sreepad Damodar Satvalekar as well as *Srimad Valmiki*

Ramayana /1/ V/6 text and English translation thereof published by Gita press Gorakhpur for the purpose of removing obscurity of English Translation of D.W. Whitney.

Amongst Western Scholars of olden days there was tradition of even translating the proper noun into English words, accordingly in her translation of "*Humayun-Nama*" Annette S. Beveridge has translated proper noun "*Gul-Badan Begam*" as "Princess Rose-Body" as also "*Dildar Begam*" as "Heart-Throwing Princess"

4. The Holy Kena-Upanishad (3.1,2,11,12 & 4.1) describes Yaksha Brahm (Translator has spelled "Brahm" as "Brahman") itself as follows:

"It was Brahman, indeed, that achieved victory for the sake of the gods. In that victory which was in fact Brahman's, the gods became elated. [Ken U.III.1]

They thought, 'Ours indeed, is this victory, ours, indeed, is this glory,' Brahman knew this pretension of theirs. To them It did appear. They could not make out about that thing, as to what this Yaksha (venerable Being) might be. [Ken U.III.2]

Then (the gods) said to Indra, 'O Maghava, find out thoroughly about this thing, as to what this Yaksha is.' (He said), 'So be it.' He (Indra) approached It (Yaksha). From him (Yaksha) vanished away. [Ken U.III.11]

In that very Space he approached her, the superbly Charming woman, viz Uma Haimavati. To Her (he said), 'What is this Yaksha?' [Ken U.III.12]

'It was Brahman', said She. 'In Brahman's victory, indeed, you became elated thus.' From that (utterance) alone, to be sure, did Indra learn that It was Brahman. [Ken U.IV.1]"

5. The Holy Scripture *Srimad Skandpuranam* (Part VII Page 142) records Echo of the said Divine Code of Holy Ordinances Sri Atharv-ved as follows:

"I bow down to the immutable Rama, the Supreme Brahman whose eyes resemble lotus, who is as dark-blue as flower of flax (in complexion) and who killed Ravana.

Great and holy is the City of Ayodhya which is inaccessible to perpetrators of evil deeds. Who would not like to visit Ayodhya wherein Lord Hari himself resided?

This divine and splendid City is on the bank of the river Sarayu. It is on a par with Amaravati (the capital of Indra) and is resorted to by many ascetics."

(*Skandpuranam .II.VIII. .. 29 -31*)

6. The Holy Scripture *Srimad Valmiki Ramayana* also describes the City of Ayodhya as '*Astapadakara*' i.e. designed as octagonal like a dice-board and, the house of Lord of Universe Sri Rama three enclosed one as follows:

"There is a great principality "known by the name of Kosala, extending along the bank of Sarayu. It is happy and prosperous, nay, full of abundant riches and plenty of food grains. In it stands comprised the world-renowned city, Ayodhya by name, a city which was built by dint of his own volition by Vaivaswata Manu, the ruler of mankind."

(Srimad Valmiki Ramayana/1/ V/6).

“Adorned with mountain like mansions built of precious Stones, and thickly set with attics it looks like Indra’s Amaravati. Presenting a colorful appearance, it is laid out after the design of a dice-board, is thronged with bevvies of lovely women and full of all varieties of precious stones, and is embellished with seven-storied buildings.”

(Srimad Valmiki Ramayana/1/ V/15-16).

“Reaching Sri Rama’s palace resplendent like a compact mass of white clouds, Vasistha (the foremost of the ascetics) drove through its three enclosures in the chariot itself.”

(Srimad Valmiki Ramayana/2/ V/5).

7. The Holy Scripture *Srimad Skandapuranam* (II.VIII.10.1-25) describing the location of the birth place of Lord of Universe Sri Rama commands the devotees to visit the birth place of Lord of Universe Sri Rama in Ayodhya and to observe the Holy vow on the *Navami* day to get salvation and acquire merits of visiting of all *Tirthas*. It testifies that only by seeing the place of birth one attains the merit of performing penance, of thousands of *Rajasuya* sacrifices and *Agnihotra* sacrifices. It reveals that one obtains the merit of the holy men by seeing a man observing the holy right particularly in the place of birth. Thus visiting and observing the holy right in the place of birth is integral part of the *Hindu Dharma*. The Holy commands reads as follows:

“The devotee shall take his holy bath in the waters of *Sarayu* and then worship *Pindaraka* who deludes sinners and bestows good intellect on men of good deeds always. The (annual) festival should be celebrated during *Navaratri* with great luxury. To the west of it, the devotee should worship *Vighnesvara* by seeing whom not even the least obstacle remains (in the affairs) of men. Hence *Vighnesvara* the bestower of all desired benefits, should be worshipped. “

(*Srimad Skandapuranam* II.VIII.10.15-17)

“To the North-East of that spot is the place of the birth of Rama. This holy spot of the birth is the means of achieving salvation etc. It is said that the place of the birth is situated to the East of *Vighneswar*, to the North of *Vasistha* and to the West of *Laumasa*. Only by visiting it a man can get the rid of staying (frequently) in womb (i.e. rebirth). There is no necessity for making charitable gifts, performing a penance or sacrifices or undertake pilgrimage to holy spots. On the *Navami* day the man should observe the Holy vow. By the power of the holy bath and charitable gifts, he is liberated from the bondage of births. By visiting the place of birth one attains that benefit which is obtained by one who gives thousand of tawny-coloured cows every day. By seeing the place of birth one attains the merit of ascetics performing penance in hermitage, of thousands of *Rajasuya* sacrifices and *Agnihotra* sacrifices performed every year. By seeing a man observing the holy right particularly in the place of birth, he obtains the merit of the holy men endowed with devotion to mother and father as well as preceptors.”

(*Srimad Skandapuranam* II.VIII.10.18-25)

8. The Holy Scripture of the The Hindus *Srimad Narashingha Puranam* (62.4-6½) commands that worship of *Vishnu* in idol as well as in *Sthandil* is best. *Sthandil* means a piece of open ground levelled, squared for sacrifice (Sanskrit-English dictionary of Moniar Williams p.1261). *Sthandilam* means a piece of land levelled, and squared for sacrifice i.e. *Vedi* (Sanskrit-Hindu Kosh of Vaman Shirman Apte p.1139). “*Vedi*” is also translated as “Sacrificial Altar” or simply “Altar”. Be it mentioned herein that *Srimad Skandapuram* (*supra*) and *Srimad Narashingha puranam* prescribe worshiping of Lord of Universe Sri Rama in *Vedi* at the birth place of Lord of Universe Sri Rama in Ayodhya. *Srimad Narashingha puranam* reveals as follows:

श्रीमार्कण्डेय उवाच

अर्चनं सम्प्रवक्ष्यामि विष्णोरमिततेजसः ।
 यत्कृत्वा मुनयः सर्वे परं निर्वाणमाप्नुयुः ॥ ४
 अग्नौ क्रियावतां देवो हृदि देवो मनीषिणाम् ।
 प्रतिमास्वल्पबुद्धीनां योगिनां हृदये हरिः ॥ ५
 अतोऽग्नौ हृदये सूर्ये स्थण्डिले प्रतिमासु च ।
 एतेषु च हरेः सम्यगर्चनं मुनिभिः स्मृतम् ॥ ६
 तस्य सर्वमयत्वाच्च स्थण्डिले प्रतिमासु च ।

श्री मार्कण्डेयजी ने कहा— अच्छा, मैं अमिततेजस्वी भगवान् विष्णु के पूजन की विधि बता रहा हूँ, जिसके अनुसार पूजन करके सभी मुनिगण परम निर्वाण (मोक्ष) पद को प्राप्त हुए हैं। अग्निमें हवन करने वाले के लिये भगवान् का वास अग्नि में है। ज्ञानियों और योगियों के लिये अपने-अपने हृदय में ही भगवान् की स्थिति है तथा जो थोड़ी बुद्धिवाले हैं, उनके लिए प्रतिमा में भगवान् का निवास है। इसलिए अग्नि, सूर्य, हृदय, स्थण्डिल (वेदी) और प्रतिमा— इन सभी आधारों में भगवान् का विधिपूर्वक पूजन मुनियों द्वारा बताया गया है। भगवान् सर्वमय हैं, अतः स्थण्डिल और प्रतिमाओं में भी भगवत्पूजन उत्तम है ॥

४-६ १/२ ॥

9. The Sacred Religious Book of the The Hindus *Sri Ramcharitmanas* reveals the Place of Birth of the Lord of Universe Sri Ram in the City of Ayodhya as follows:

“At the other end Sri Rama who brought delight to the soul of race as the sun to the lotus was busy saying the charming city to the monkies. Listen ‘King of the monkies (Sugriva), Angada and Vibhisana, holy is this city and beautiful is this land. Although all after extolled Vaikuntha who is follower to the Vedas and Purans and known throughout the

world. It is not so dear to Me as the city of Ajodhya; only some rare soul knows this secret. This beautiful city is My birthplace; to the North of it flows the Holy Sarayu by bathing in which men secure a home near Me without any difficulty. The dwellers here are very dear to Me; the city is only full of pleases itself, but bestows a residence in My divine Abode.' The monkies were all delighted to hear these words of the Lord and said that blessed indeed is Ajodhya that has evoked praise from Sri Rama Himself !"

(Sri Ramcharitmanas/ Uttara-kanda 3.1-4)

10. The Sacred Religious Book of the The Hindus Sri Ramcharitmanas reveals that the Lord of Universe Sri Ram was not born in ordinary manner like other human being, but first He appeared as Lord of Universe Sri Vishnu bearing His characteristic emblems in His four-arms and later on for the sake of Mother Sri Kaushalya on her prayer He assumed a form of infant which was a product of His own will. This sacred book records birth of Lord of Universe Sri Ram as follows:

"The gracious Lord, who is compassionate to the lowly and benefactor of Kaushalya appeared. The thought of His marvellous form, which stole the heart of sages, filled the mother with joy. His body was dark as a cloud, the delight of all eyes; in His four-arms He bore His characteristic emblems (a conch-shell, a discus a club and a lotus). Adorned with jewels and a garland of sylvan flower and endowed with large eyes, the Slayer of the demon Khara was an ocean of beauty. Joining both her palms the mother said , "O infinite Lord, how can I praise you! The Vedas as well as the Puranas declare You as transcending Maya, beyond attributes, above knowledge and beyond all measures. He who is sung by the Vedas and the holy man as an ocean of mercy and bliss and a repository of all virtues, the same Lord of Lakshmi, the lover of His devotees, has revealed Himself for my good. The Vedas proclaim that every pore of your body contains multitudes of universes brought forth by Maya. That such a Lord stayed in my womb-this amusing story staggers the mind of even men of wisdom." When the revelation came upon the mother, the Lord smiled; He would perform many a sportive act. Therefore He exhorted by telling her the charming account of her previous birth so that she might love Him as her own child. The mother's child was changed: She spoke again, "Give up this superhuman form and indulge in childish sports, which are so dear to a mother's heart; the joy that comes from such sports is unequalled in every way." Hearing these words the all-wise Lord of immortal became an infant and began to cry. Those who sing this lay (says Tulsidas) attain to the abode of Sri hari and never fall into the well of mundane existence."

(Sri Ramacharitmanasa/Bala-kanda/191/1-4)

"For the sake of Brahmans, cows, gods and saints, the Lord who transcends Maya and is beyond the three modes of Prakriti (Sattva, Rajas and Tamas) as well as beyond the reach of senses took birth as a man assuming a form which is a product of His own will."

(Sri Ramacharitmanasa/ Bala-kanda /192)

11. Sri Golapchandra Sarkar, Sastri in his celebrated Treatise on Hindu Law (first published in 1897) also approves the belief of the The Hindus that their Gods did not borne like human beings as follows:

“ the Idea – that their Gods are deemed born like human beings , -is most repugnant and abhorrent to The Hindus who have knowledge of their Shastras.”

(A Treatise On Hindu Law. 6th edn.1927 Cha.XIV Page 785)

12. The Holy Scripture Shrimad Valmiki Ramayana reveals that there was a temple of Lord of Universe Sri Janardan i.e. Sri Vishnu in the Mother Kaushalya's Palace as follows:

“ Entering in his own palace in order to break the news of the installation announced by the emperor (to Sita), but coming out instantly on not finding her in the apartments) he moved to his mother's apartment (in the gynaeceum). There he saw his aforesaid mother clad in silken robes, exclusively devoted to the worship of her chosen deity Praying for royal fortune (in favour of Sri Rama) Hearing of Sri Rama's welcome installation, Sumitra too had arrived as well as (her Son) Lakshman; and Sita (too) had been sent for (there). At that moment when (Sri Rama called on her) Kausalya remained sitting with her eyes closed and waited upon by Sumitra and Lakshman, and contemplating with suspended breath on the Supreme Person, Lord Narayana (who is solicited by all men), having heard that her son was going to be installed in the office of Prince Regent when the asterism Pusya was in the ascendant.”

(Valmiki Ramayana/1/ IV/29-33)

13. Srimad Skandpuranam (II.VIII.10. 1 -87) enumerates Sarayu (a river), Vishnuhari, Brahmakunda (a Holy Lake), Mantresvara, Chakratirtha (tirtha of holy water), Chakrahari, Dharmahari, Vira, Surasa, Bandi, Sitala, Batuka, Holy-lake in front of Batuka, Mahavidya, Pindaraka, Bhairava, Vighnesvara, Vasistha, Laumas and Janamsthan of Lord of Universe Sri Ram as Tirthas and Devasthanam of Ayodhya and right from the Tretayuga these sacred places are being visited and worshiped according to Scriptural customary rituals. .
14. Srimad Skandpuranam [Part VII inner Page 142 i.e. ibid II.VIII.....26 -31& ibid II.10.VIII.1-87] reveals that the Tradition of Pilgrimage to the Birth Place of the Lord of Universe Sri Ram as well as other Devasthanam in Ayodhya according to injunctions was told by sage Narada to Sri Skand. This Sage Narada was of Tretayug and contemporary of the Lord of universe Sri Ram on whose instance Maharshi Valmiki wrote Ramayana. Then it was narrated to Sage Agastya. From the Tradition of Acharyas it came down from Sage Agastya to Sage Krishna Dviapayan Vyas who recounted it to Suta.
15. The Sacred Religious Book of the Hindus Sri Ramcharitmanas records celebration of Birthday Festival of the Lord of Universe Sri Ram in the year 1574 A.D. on the day of Chaitra Shukla Navami Tuesday at His Birth Place Temple in Ayodhya as follows:

“ Reverently bowing my head to Lord Siva, I now proceed to recount the fair virtues of Sri Rama. Placing my head on the feet of Sri Hari

I commence this story in the Samvat year 1631 (1574 A.D.). On Tuesday, the ninth of the lunar month of Caitra, this story shed its luster at Ayodhya. On this day of Sri Rama's birth the presiding spirits of all holy places flock there – so declares the Vedas – and demons, Nagas, birds, human beings, sages and Gods come and pay their homage to the Lord of Raghus. Wise men celebrate the great birthday festival and sing the sweet glory of Sri Rama.”

(Sri Ramcharitamanasa /Balkanda 33.2-4)

16. Bharat-Ratna Mahamahopadhyay Dr. Pandurang Vaman Kane in his book Dharmashastra Ka Itihas Tiritiya Bhag (3rd Edn. 1994 published by Uttar Pradesh Hindi Sansthan, Lucknow) in chapter 11 has summarised tradition, importance, spiritual merits, of the sacred places of the The Hindus as laid down in the Divine Holy Vedas, Smritis, Puranas, Ramayana, Mahabharata and other Religious books which make it crystal clear that The Pilgrimage is integral part of Hinduism. Relevant pages thereof forms part of volume I of the compilation of this defendant as document no. 19. On inner page 1371 of the said book relevant Slokes of the Holy Scriptures - Sri Brahmand Puran (4.40.91); Sri Skand Puran(Kashikhand 6.68 & 23.7); Sri Garud Puran (Pretkhand 34.5-6) have been reproduced wherein amongst seven Holiest Pilgrimage Centres Ayodhya has been enumerated alongwith Mathura, Maya (Hardwar), Kashi (Varanasi), Kanchi, Avantika (Ujjain) and Dwaravati (Dwarka). On inner page 1403 of the said book in the list of Sacred Places Ayodhya has also been enlisted and described.
17. In the book Bharat Ka Gazetteer, Khand 1 (published by the Publication Division Ministry of Information and Broadcasting Government of India reprint 1973 of the 1st revised Edn. 1964) on its page 499 Sri Ramchandra have been described as an incarnation and on pages 698 to 701 festivals, fairs and pilgrimages have been described and recognised as age-old tradition of the Hindu faith and belief.
18. Three-domed Temples are characteristic features of the Hindu Architectures. The Holy Sri Agni Puran (38.8) says that one who builds Trayatan (Three-domed) Temple goes to the Brahm-lok (Abod of Almighty).
19. Ibn Battuta also mentions a Three-domed Hindu Temple in Kachrad now known as Khajrawan towards 27 miles east from Chhatrapur City in Bundelkhand region. He writes that the said Three-domed Temple was built of red-stone in the centre of a lake and Yogis were living therein. Eyes, ears and noses of the Idols of the Temple had been mutilated by the Muslims. Relevant extract from Pages 181 & 182 of the book Ibn Battuta Ki Bharat Yatra translated into Hindi by Madan Gopal. First Edition 1933 Reprinted in 1997 by National Book Trust India, New Delhi reads as follows:

बरौन नामक नगर से चलकर, अमबारी होते हुए, हम कचराद नामक स्थान में पहुंचे। यहाँ पर एक मील लंबे सरोवर के किनारे बहुत-से मंदिर बने हुए हैं, परंतु इन मंदिरों की प्रत्येक प्रतिमा की आँख, नाक और कान मुसलमानों ने काट लिए हैं।

सरोवर के मध्य में रक्तपाषाण के तीन गुंबद बने हुए हैं। इनके अतिरिक्त प्रत्येक कोण पर भी इसी प्रकार के गुंबद निर्मित हैं जिनमें योगी लोग निवास करते हैं। योगियों के केश पैर तक लंबे होते हैं, सारे शरीर में भभूत लगी रहती है और तपस्या के कारण उनका वर्ण तक पीत हो जाता है। चमत्कार दिखाने की शक्ति प्राप्त करने के इच्छुक बहुत से मुसलमान भी इनके पीछे पीछे लगे फिरते हैं। लोगों का तो यह कथन है कि गलित तथा श्वेतकुष्ठ तक से पीड़ित पुरुष योगियों की सेवा में उपस्थित होने पर ईश्वर-कृपा से आरोग्य लाभ करते हैं। मावरा उन्नहर के सम्राट 'तरम शीरी' के कैंप में मुझको इनके सर्वप्रथम दर्शन हुए। गिनती में ये पूरे पचास थे। इनके रहने के लिए धरती के भीतर गुहाएं बनी हुई थीं और वहीं धरातल के नीचे ये अपना जीवन व्यतीत करते थे, केवल शौच के लिए बाहर आते थे और प्रातः, सायं तथा रात्रि में जंग के सदृश किसी वस्तु को बजाया करते थे। इन लोगों की जीवनचर्या भी अजीब विचित्र थी।

PART - II

SVYAMBHU SYMBOLS OF DEITIES DO NOT NEED PRATISTHA WHILE PRATISTHA OF MANMADE SYMBOLS OF DEITIES CAN BE DONE BY SINGLE MANTRA OF THE DIVINE YAJURVED.

1. According to Shastric (Scriptural) injunctions Sri Ramajanmasthan Sthandil, a Svayambhu Linga (Symbol) brought into existence and established by the Lord of Universe Sri Vishnu Himself as such in spite of being decayed, or damaged, or destroyed It shall forever remain sacred place of Worship as it does not need purification or consecration or change. Pratistha is required only in respect of man-made Images/Idols/Symbols of Deities that can be done by chanting single Mantra XXXI.1 or II.13 of the Holy Divine Sri Yajurved (Vagasaneyee Samhita also known as Sri Shukla Yajurved) .A deity needs to be worshipped by providing all things which are required for leading a healthy and excellent life.
2. Svayambhu i.e. Self-built or Self existent or Self-revealed Lingas (symbols) of Devatas (Gods) or, the Lingas (Symbols) established by Gods, or by those versed in the highest religious truths, or by Asuras, or by sages, or by remote ancestors, or by those versed in the tantras need not to be removed though decayed or even broken. Only decayed or broken Pratisthita Images/Idols require to be replaced with new one. In respect of renewal of the images Treatise on Hindu Law celebrated Jurist Golapchandra Sarkar, Sastri reproduces the Shastric injunction (Scriptural law) as follows:

“Raghunanda’s Deva-Pratistha-Tantram, last paragraph reads as follows:

“8. Now (it is stated) the prescribed mode of Renewal of Decayed Images. Bhagwan says – ‘I shall tell you briefly the holy ordinance for renewing Decayed Images * * *’

“Whatever is the material and whatever size of the image of Hari (or the God, the protector) that is to be renewed; of the same material and of the same size, and image is to be caused to be made; of the same size of the same form (and of the same material), should be (the new image) placed there; either on the second or on the third day (the image of Hari should be established; if, (it be) established after that, even in the prescribed mode, there would be blame or censure or sin; in this very mode the linga or phallic symbol and the like (image) should be thrown away; (and) another should be established, of the same size (&c.) as already described, - Haya-Sirsha”.

“9. God said, -

‘I shall speak of the renewal in the prescribed mode of lingas or phallic symbols decayed and the like &c * * *. (A linga) established by Asuras, or by sages or by remote ancestors or by those versed in the tantras should not be removed even in the prescribed form, though decayed or even broken.’

(Agnipuranam Chapter 103 Poona Edition of 1900 AD. p.143)

[There is a different reading of a part of this sloke noted in the footnote of the Poona Edition of this Puran as one of the Anandashram

series of sacred books: according to which instead of – “ or by remote ancestors or by those versed in the tantras” – the following should be substituted, namely].

“Or by Gods or by those versed in the highest religious truths.”

“10. Now Renewal of Decayed (images is considered); that is to be performed when a linga and the like are burnt or broken or removed (from its proper place). But this is not to be performed with respect but a linga or the like which is established by a Sinddha or one who has become successful in the highest religious practice, or which is anadi i.e. of which the commencement is not known, or which has no commencement. But their Mahabhisheka or the ceremony of great anointment should be performed: - this is said by Tri-Vikrama” – Nirnaya – Sindhu – Kamalakar Bhatta, Bombay Edition of 1900 p.264.

The author of the Dharma-Sindhu says as above in almost the same words – see Bombay Edition of 1988 p.234 of that work.”

[Treatise on Hindu Law by Golapchandra Sarkar, Sastri (6th Edition, published by Easter Law House in 1927 at p.745-748]

3. Alberuni who compiled his book India in or about 1030 A.D. on page 121 of his book has written that the Hindus honour their Idols on account of those who erected them, not on account of the material of which they are, best example whereof is Linga of sand erected by Rama. In his book on pages 117, 209, 306-07 and 380 he has also narrated about the Lord of Universe Sri Rama. Relevant extract from page 121 of his book Alberuni's India Translated by Dr. Edward C. Sachau. Reprint 2007 of the 1st Edn. 1910 published Low Price Publications, Delhi reads as follows:

“The Hindus honour their idols on account of those who erected them, not on account of the material of which they are made. We have already mentioned that the idol of Multan was of wood. E.g. the linga which Rama erected when he had finished the war with the demons was of sand. Which he had heaped up with his own hand. But then it became petrified all at once, since the astrologically correct moment for the erecting of the monument fell before the moment when the workmen had finished the cutting of the stone monument which Rama originally had ordered.”

(ibid page 121)

4. According to the Hindus' Divine Holy & Sacred Scriptures there are two types of images one Svayambhu (self-existent or self-revealed or self-built) and other Pratisthita (established or consecrated). Where the Self-possessed Lord of Universe Sri Vishnu has placed himself on earth for the benefit of mankind, that is styled Svayambhu and it does not require Pratistha. As at Ramajanamasthan the Lord of Universe Sri Vishnu appeared and placed Himself on said sacred place said sacred place itself became Svayambhu for the reason that invisible power of the Almighty remained there which confers merit and salvation to the devotees. Consecrated artificial man-made Lepya images i.e. moulded figures of metal or clay; and Lekhyas i.e. all kinds of pictorial images including chiselled figures of wood or stone not made by moulds are called Pratisthita. . B. K. Mukherjee in his book on Hindu Law

referring authorities describes Svayambhu and Pratisthita artificial Images as follows:

“4.5 Images – their descriptions –

images, according to Hindu authorities are two kinds; first is known as Svayambhu or self-existent, while the other is Pratisthita or established. The Padmapuran says : The image of Hari (God) prepared of stone, earth, wood, metal, or the like and established according to the rights laid down in Vedas, Smritis and tantras are called the established; ...

where the self possessed Vishnu has placed himself on earth in stone, or wood for the benefit of mankind, that is styled the self re-built.” Svayambhu or self-built image is a product of nature, it is anadi or without any beginning and the worshipper’s simply discover its existence. Such image does not require consecration or Pratistha. All artificial or man made images require consecration. An image according to Matsyapuran may properly be made of gold, silver, copper, iron, bronze or bell metal or any kind of gem, stone, or wood, conch shell, crystal or eve earth. Some persons worship images painted on wall or canvas says the says the Britha Puran and some worship the spheroidical stones known as Salgran. Generally speaking, the puranic writers classified artificial images under two heads; viz. (1) Lepya and (2) Lekhya. Lepya images are moulded figures of metal or clay, while Lekhyas denote all kinds of pectoral images including chiselled figures of wood or stone not made by moulds.

[Hindu Law of Religious and Charitable Trusts of B. K. Mukherjea 5th Edition, Published by Eastern Law House at page 154.]

5. According to the Holy Scripture Sri Narsingh Puranam (62.7-14 ½) Pratistha of the Lord of Universe Sri Vishnu should be done by chanting 1st Richa of the Purush Sukta of Shukla Yajurved [i.e. Vagasaneyee Samhita Chapter XXXI] and be worshipped dedicating prescribed offerings by chanting 2nd to 15th Richas of the Purush Sukta. And if worshipper so wish after completion of worship he may by chanting 16th Richas of the Purush Sukta pray to Sri Vishnu for going to his His own abode. Above-mentioned verses of Sri Narsingh Puranam and Hindi translation thereof reads as follows:

तस्य सर्वमयत्वाच्च स्थण्डिले प्रतिमासु च।

आनुष्टभस्य सूक्तस्य विष्णुस्तस्य च देवता॥७

पुरुषो यो जगद्बीजं ऋषिर्नारायणः स्मृतः।

दद्यात्पुरुषसूक्तेन यः पुष्पाण्यप एव च॥८

अर्चितं स्याज्जगत्सर्वं तेन वै सचराचरम्।

आद्ययाऽऽवाहयेद्देवमृचा तु पुरुषोत्तमम्॥९

द्वितीययाऽऽसनं दद्यात्पाद्यं दद्यात्तृतीयया।

चतुर्थार्घ्यः प्रदातव्यः पंचम्याऽऽचमनीयकम्॥१०

षष्ठ्या स्नानं प्रकुर्वीत सप्तम्या वस्त्रमेव च।

यज्ञोपवीतमष्टम्या नवम्या गन्धमेव च॥११

दशम्या पुष्पदानं स्यादेकादश्या च धूपकम्।

द्वादश्या च तथा दीपं त्रयोदश्यार्चनं तथा॥१२

चतुर्दश्या स्तुतिं कृत्वा पंचदश्या प्रदक्षिणम्।

षोडश्याद्वासनं कुर्याच्छेषकर्माणि पूर्ववत्॥१३

स्नानं वस्त्रं च नैवेद्यं दद्यादाचमनीयकम्।

षण्मासात्सिद्धिमाप्नोति देवदेवं समर्चयन्॥१४

संवत्सरेण तेनैव सायुज्यमधिगच्छति।

अब पूजन का मंत्र बताते हैं। शुक्ल यजुर्वेदीय रुद्राष्टाध्यायी में जो पुरुषसूक्त है, उसका उच्चारण करते हुए भगवान् का पूजन करना चाहिए। पुरुषसूक्त का अनुष्टुप् छन्द है, जगत् के कारणभूत परम पुरुष भगवान् विष्णु देवता हैं, नारायण ऋषि हैं और भगवत्पूजन में उसका विनियोग है। जो पुरुषसूक्तसे भगवान् को फूल और जल अर्पण करता है, उसके द्वारा सम्पूर्ण चराचर जगत् पूजित हो जाता है। पुरुषसूक्त की पहली ऋचा से भगवान् पुरुषोत्तम का आवाहन करना चाहिए। दूसरी ऋचा से आसन और तीसरी से पाद्य अर्पण करे। चौथी ऋचा से अर्घ्य और पाँचवीं से आचमनीय निवेदित करे। छठी ऋचा से स्नान कराये और सातवीं से वस्त्र अर्पण करे। आठवीं से यज्ञोपवीत और नवमी ऋचा से गन्ध निवेदन करे। दसवीं से फूल चढ़ाये और ग्यारहवीं ऋचा से धूप दे। बारहवीं से दीप और तेरहवीं ऋचा से नैवेद्य, फल, दक्षिणा आदि अन्य पूजन-सामग्री निवेदित करे। चौदहवीं ऋचा से स्तुति करके पंद्रहवीं से प्रदक्षिणा करे। अन्त में सोलहवीं ऋचा से विसर्जन करे। पूजन के बाद शेष कर्म पहले बताये अनुसार ही पूर्ण करे। भगवान् के लिए स्नान, वस्त्र, नैवेद्य और आचमनीय आदि निवेदन करे। इस प्रकार देवदेव परमात्मा का पूजन करने वाला पुरुष छः महीने में सिद्धि प्राप्त कर लेता है। इसी क्रम से यदि एक वर्ष तक पूजन करे तो वह भक्त सायुज्य मोक्ष का अधिकारी हो जाता है। ७-१४ १/२॥

(Sri Narsingh Puranam 62.7-14 ½)

Be it mentioned herein that in the above Sri Narsingh Puranam 62.13 Sloke enumerates Pradakshina i.e. Parikrama (circumbulation) as 14th means of reverential treatment of the Deity and thereby makes it integral part of the religious customs and rituals of service and worship of a Deity.

6. 1st Holy Spells of Purush Sukta of the Holy Devine Shukla Yajurved [i.e. Vagasaneyee Samhita Chapter XXXI] prescribed by the Holy Sri Narsingh Puranam for Pratistha of the Lord of Universe Sri Vishnu reads as follows:

सहस्रशीर्षा पुरुषः सहस्राक्षः सहस्रपात्।

स भूमिं सर्वतः स्पृत्वाऽत्यतिष्ठद्दशाङ्गुलम्॥१॥

मन्त्रार्थ : सभी लोकों में व्याप्त महानारायण सर्वात्मक होने से अनन्त शिर वाले, अनन्त नेत्र वाले और अनन्त चरण (पैर) वाले हैं। ये पाँच तत्त्वों से बने इस गोलकरूप समस्त व्यष्टि और समष्टि ब्रह्माण्ड को तिरछा, ऊपर, नीचे सब तरफ से व्याप्त कर नाभि से दस अंगुल परिमित देश, हृदय का अतिक्रमण कर अन्तर्यामी रूप में स्थित हुए थे॥१॥

(ibid as translated by Swami Karpatriji and published by Sri Radhakrishna Dhanuka Prakasan Samsthanam, Edn. Vikram samvat 2048)

Simple English translation whereof reads as follows:

The Almighty God who hath infinite heads, infinite eyes; infinite feet pervading the Earth on every side and transgressing the universe installed Him in sanctum as knower of inner region of hearts’.

Be it mentioned herein in the Mimamsa Darshan as commented in Sanskrit by Sri sabar Swami and in Hindi by Sri Yudhisthir Mimamsak and Mahabhasya meaning of “Sahasra” has also been given “infinite” as also “one” apart from “thousand” and according to context one or other meaning is adopted

7. Nitya Karma Puja Prakash has prescribed a Mantra of Yajurved [i.e. Vagasaneyee Samhita Chapter II.13] for Pratistha of Lord Ganesh. Relevant portion of the said book reads as follows:

अनन्तर सर्वप्रथम गणेशजी का पूजन करे। गणेश-पूजनसे पूर्व उस नूतन प्रतिमाकी निम्न-रीति से प्राण-प्रतिष्ठा कर ले—

प्रतिष्ठा— बायें हाथ में अक्षत लेकर निम्न मंत्रों को पढ़ते हुए दाहिने हाथ से उन अक्षतों को गणेशजी की प्रतिमा पर छोड़ता जाय—

ॐ मनो जूतिर्जुषतामाज्यस्य बृहस्पतिर्यज्ञमिमं तनोत्विरिष्टं यज्ञं समिमं दधातु। विश्वे देवास इह मादयन्तामोऽम्प्रतिष्ठ।

ॐ अस्यै प्राणाः प्रतिष्ठन्तु अस्यै प्राणाः क्षरन्तु च। अस्यै देवत्वमर्चायै मामहेति च कश्चन।।

इस प्रकार प्रतिष्ठा कर भगवान् गणेश का षोडशोपचार पूजन (पृ. सं. १७४-१८५ के अनुसार) करे। तदन्तर नवग्रह (पृ. सं. २१०), षोडशमातृका (पृ. सं. २०५) तथा कलश-पूजन (पृ. सं. १८६) के अनुसार करे।

[Nitya Karma Puja Prakash published by Gita Press Gorakhpur 32nd Edn. 2060 Vikram Samvat at page 244]

8. The Holy Sri Satpath-Brahman interpreting said Mantra II.13 of the Holy Sri Shukla Yajurved [i.e. Vagasaneyee Samhita] says that Pratistha of all Gods should be done by said Mantra. Be it mentioned herein that the Holy Sri Satpath-Brahman being Brahmna Part of Divine Sri Shukla Yajurved, interpreting Mantras of said Vagasaneyee Samhita tells about application of those Mantras in Yajnas (Holy Sacrifices). Said Mantra II.13 of the Divine Sri Shukla Yajurved (Vagasaneyee Samhita) as well as Sri Satpath-Brahman (I.7.4.22) with original texts and translations thereof read as follows:

मनो जूतिर्जुषतामाज्यस्य बृहस्पतिर्यज्ञमिमं तनोत्विरिष्टं यज्ञं समिमं दधातु।

विश्वे देवास इह मादयन्तामोऽम्प्रतिष्ठ।।१३।।

४४. (जूति मनःआज्यस्य जुषतां) तेरा वेगवान् मन घृतका सेवन करे, (बृहस्पतिः इमं यज्ञं तनोतु) ज्ञान का स्वामी इस यज्ञ को फैलाये, (इमं यज्ञं अरिष्टं सं दधातु) इस यज्ञ को हिंसारहित करके सम्यक् धारण करे। (विश्वे देवासः इह मादयन्तां) सब देव यहां आनन्दित हों, (ओं प्रतिष्ठ) ऐसा ही होवे, प्रतिष्ठित होवे।।१३।।

(ibid Hindi Translation of Padmbhushan Sripad Damodar Satvalekar, 1989 Edn. Published by Swayadhyay Mandal pardi)

English Translation of the abovenoted Hindi Translation reads as follows:

“May your mind Delight in the gushing (of the) butter. May Brihaspati spread (carry through) this sacrifice ! May he restore the sacrifice uninjured. May all the Gods rejoice here. Be established/seated here.”

Sanskrit text of *Sri Satpath-Brahman* (I.7.4.22) as printed in ‘*Sri Shukla Yajurvediya Satpath Brahman*’ Vol. I on its page 150, Edn. 1988 Published by Govindram Hasanand, Delhi 110006 is reproduced as follows:

मनो जूतिर्जुषतामाज्यस्येति । मनसा वाऽइदं सर्वमाप्तं तन्मनसैवैतत्सर्वमाप्नोति बृहस्पतिर्यज्ञमिमं
तनोत्व रिष्टं यज्ञं समिमं दधात्विति यद्विवृढं तत्संदधाति विश्वे देवास इह मादयन्तामिति सर्वं वै,
विश्वे देवाः सर्वेणैवैतत्संदधाति स यदि कामयेत ब्रूयात्प्रतिष्ठेति यद्यु काममेतापि नाद्रियेत ॥२२॥
ब्राह्मणम् ॥ २.(७.४) ॥ अध्यायः ॥ ७ ॥

English translation of *Sri Satpath-Brahman* (I.7.4.22) as printed in Volume 12 of the series “The Sacred Books Of The east” under title ‘*The Satpath - Brahmana*’ Part I on its page 215, Edn. reprint 2001 Published by Motilal Banarasidass, Delhi 110007 is reproduced as follows:

22. [He continues, Vag. S. II 13]; 'May his mind delight in the gushing (of the) butter' By the mind, assuredly, all this (universe) is obtained (or pervaded, aptam): hence he thereby obtains this All by the mind. –'May Brihaspati spread (carry through) this sacrifice ! May he restore the sacrifice uninjured! – he thereby restores what was torn asunder.—' May all the gods rejoice here ! – ' all the gods,' doubtless, means the All: hence he thereby restores (the sacrifice) by means of the All. He may add, 'Step forward!' if he choose; or, if he choose, he may omit it.

(*Sri Satpath-Brahman* I.7.4.22)

9. 19th Holy Spells of *Nasadiya Sukta* of the Holy Devine *Shukla Yajurved* [i.e. *Vagasaneyee Samhita* Chapter XXIII] is also widely applied by the Knower of the Scriptures to invoke and establish a deity. Said Mantra reads as follows:

गणानां त्वा-गणपतिं हवामहे प्रियाणां त्वा प्रियपतिं हवामहे निधीनां त्वां निधिपतिं
हवामहे वसो मम । आहमजानि गर्भधमा त्वम्जासि गर्भधम् ॥१९॥

English Translation of this *Mantra* based on Hindi Translation of Padmbhushan Sripad Damodar Satvalekar, 1989 Edn. Published by Swayadhyay Mandal pardi reads as follows:

“O, Lord of all beings we invoke Thee. O, Lord of beloved one we invoke Thee. O, Lord of Wealth we invoke Thee. O abode of all beings Thou are mine. O, Sustainer of Nature let me know Thee well because Thee the sustainer of Universe as embryo are Creator of All.”

[Shukla Yajurved Chapter XXIII Mantra 19]

10. The vivified image is regained with necessities and luxuries of life in due succession changing of clothes, offering of water, sweets as well as cooked and uncooked food, making to sleep, sweeping of the temple, process of smearing, removal of the previous day's offerings of flowers, presentation of fresh flowers and other practices are integral part of Idol-worship. These worships in public temple in olden days were being performed by Brahmins learned in Vedas & Agamas. B. K. Mukherjea in his book on Hindu Law writes as follows:

“4.7 Worship of the idol – after a deity is installed it should be worshipped daily according to Hindu Shastras. The person founding a deity becomes morally responsible for the worship of the deity even if no property is dedicated to it. This responsibility is always carried out by a pious Hindu either by personal performance of the religious right or in the case of Sudras by the employment of a Bramhin priest. The daily worship of a sacred image including the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the reciprocal obligation of rice with sweets and water and other practices.” The deity in shout is conceived of as leaving being and is treated in the same way as the master of the house would be treated by him humble servant. The daily routine of live is gone through, with minute accuracy, the vivified image is regained with necessities and luxuries of life in due succession even to the changing of clothes, the offering of cooked and uncooked food and the retirement to rest.

[Hindu Law of Religious and Charitable Trusts of B. K. Mukherjea 5th Edition, Published by Eastern Law House at page 156.]

PART – III

ADVERSE POSSESSION OF DEBUTTER PROPERTY IS IMPERMISSIBLE IN HINDU LAW :

1. From the holy scriptures that are foundation of the Hindu Law it is crystal clear that in respect of the property of learned Brahmin versed in Vedas, minor, women and Kings rule of adverse possession is not applicable according to Hindu Law, as also that a King cannot acquire title over the property of his subject by way of adverse possession. According to the Hindu Law, land or temple dedicated to deities were always gifted to the Deities through such Brahmins who were well versed in Vedas and Agamas by making them Sebaites. The rule of adverse possession was not applicable in respect of the properties of the Gods, Brahmins well versed in Vedas, Deities, Kings, women and minors. As such prior to passing of the Limitation Act by the British Government according to Hindu law the sacred shrine of *Sri Ramajanamasthan* was not liable to be extinguished by way of adverse possession as the law for time being in force i.e. Law of *Shariyat* also did not recognise adverse possession.
2. The Holy Scripture Sri Manusmriti XI.20 & XI.26 lays down law that the property of the Gods cannot be taken by dispossessing its custodian and who, seizes the property of the Gods, or the property of Brahmanas, lives, in the other world, upon the leavings of vultures. The oldest and most Authoritative of the commentators of Manu, Medhatithi explaining the said verses says that 'Property of the gods' is the name given to all that belongs to such men of the three higher castes as are disposed to perform sacrifices. 'Property of the Brahmana' is the name that is applied to the belongings of even such Brahmanas as are not disposed to perform sacrifices. English translation of the said verse 11.26 as well as Medhatithi's commentary thereon from page nos. 357-358 from Manusmriti Vol-7 translated by Ganganath Jha and published by Motilal Banarasidass Publishers Private Limited, Delhi 2nd Edn. 1999 reads as follows:

"The property of persons given to perform sacrifices the Learned regard as 'the property of the Gods;' while the properties of those who do not perform sacrifices is described as 'the property of Demons.'

(Manusmriti-11.20)

Bhasya.

This also is a declamatory declaration in support of the teaching that 'no property shall be taken from men possessed of good qualities, but there is no harm if it is taken from those devoid of qualities.'

(Commentary on Manusmriti-11.20)

"The sinful man who, through covetousness, seizes the property of the Gods, or the property of Brahmanas, lives, in the other world, upon the leavings of vultures"

(Manusmriti-11.26)

Bhasya.

'Property of the gods' is the name given to all that belongs to such men of the three higher castes as are disposed to perform sacrifices. 'Property

of the *Brahmana*' is the name that is applied to the belongings of even such Brahmanas as are not disposed to perform sacrifices.

It is in this sense that the verse may be construed:

As a matter of fact however Verse 20 above, which says –

The property of those disposed to perform sacrifices the wise call the '*property of the gods*' etc.' – is purely declamatory, and not meant to provide the definition of technical terms; like such terms as 'theft' and the like. For this reason we proceed to explain it differently.

That wealth which has been set apart as to be spent for the gods, in the performance of sacrifices and other such acts, is '*the property of the gods*'; as direct ownership is not possible for the gods. In fact the gods never make use of any property, by their own wish; nor are they found to be actually taking care of any property; and it is where all this is found that property is said in ordinary life to belong to a person. Hence the name '*property of the gods*' must apply to that which has been set apart as to be used on behalf of the gods, - with such formula as 'this is no longer mine, it is the god's.' And this can refer to only what has been enjoined as to be offered to Agni and other deities at the *Darsha-purnamasa* and other sacrifices; and it is merely on the basis of the custom of cultured people that it can be applied, only figuratively, to what is offered at sacrifices to Durga and other deities (which latter are not enjoined in the Veda).

"In the ordinary world, it is property dedicated to the four-armed and other images in temples that is called 'the property of the gods,' and it is only right that in the interpretation of scriptures we should accept that that meaning of a word in which it is used in ordinary parlance."

(Commentary on Manusmriti-11.26)

3. The Holy Scripture Sri Brihashpati Smriti (compiled in the book 'Ashtadas Smriti', 1st Edition, 1891 revised and enlarged Edn. 1990 published by Nag Prakashak, Delhi) says that who confiscate the land endowed by him or others the confiscator of land taking birth as a worm being roasted in stool of dogs along with his manes for sixty thousand years; and the confiscator (of a grant), or he who assents (to an act of confiscation), shall dwell in same but one hell. Brahmins' property is such a poison which kills sons and grandsons of the confiscator. Confiscation of the Debutter Property causes destruction of soul and clan. Who did not inform the King about such usurpation of land, he invites sin of killing of Brahmin and the King who did not prevent usurpation of land in spite of being informed by the Brahmin, he is known as assassinator of Brahmins. Relevant slokes numbers 25, 26, 28, 29, 46, 52, 67 and 68 of the said book read as follows:

पृथोर्यदोर्दिलीपस्य नृगस्य नहुषस्य च।

अन्येषाञ्च नरेन्द्राणां पुनरन्या भविष्यति॥२५॥

पृथु, यदु, दिलीप, नृग, नहुष और (भूमि का दान करने वाले) अन्य राजा फिर से अन्य पृथ्वी को प्राप्ति हो जाएंगे।

बहुभिर्वसुधा दत्ता राजभिः सगरादिभिः।

यस्य यस्य यथा भूमिस्तस्य तस्य तथा फलम्॥२६॥

सगर आदि बहुत से राजाओं के द्वारा पृथिवी का दान किया गया है। जिस-
जिस ने जैसी भूमि दान में दी थी उसे उसका वैसा ही फल प्राप्त हुआ।

स्वदत्तां परदत्तां वा यो हरेच्च वसुन्धराम्।

श्वविष्ठायां क्रिमिर्भूत्वा पितृभिः सह पच्यते॥२८॥

जो अपने द्वारा दान की हुई अथवा दूसरे के द्वारा दान की हुई भूमि को
छीनता है, वह कुत्ते की विष्ठा में कीड़ा होकर पितरों सहित पकाया जाता है।

आक्षेप्ता चानुमन्ता च तमेव नरकं व्रजेत्।

भूमिदो भूमिहर्ता च नापरं पुण्यपापयोः।

उद्धर्वाधो वाऽवतिष्ठेत यावदाभूतसंप्लवम्॥२९॥

छीनने वाला और छीनने की अनुमति देने वाला दोनों एक ही नरक में जाते
हैं अन्य में नहीं। भूमि का दान करने वाला और भूमि छीनने वाला दोनों अपने
पुण्य और पाप के हेतु क्रमशः ऊपर (स्वर्ग में) और नीचे (नरक में) सृष्टि के
प्रलय तक निवास करते हैं।

न विषं विषमित्याहुर्ब्रह्मस्वं विषमु च्यते।

विषमेकाकिनं हन्ति ब्रह्मस्वं पुत्रपौत्रकम्॥४६॥

विष को विष नहीं कहते, ब्राह्मण का धन विष कहा जाता है। विष तो एक
(खाने वाले) को ही मारता है, ब्राह्मण का धन पुत्र और पौत्र को भी मार देता
है।

ब्रह्मस्वेन तु यत् सौख्यं देवस्वेन तु या रतिः।

तद्धनं कुलनाशाय भवत्यात्मविनाशनम्॥५२॥

ब्राह्मण के धन से जो सुख मिलता है, देवों के धन से जो जो प्रसन्नता होती
है, आत्मा का विनाश करने वाला वह धन कुल के नाश के लिए होता है।

भूमिर्गावस्तथा दाराः असह्य ह्रियन्ते यदा।

न चाऽऽवेदयते यस्तु तमाहुर्ब्रह्मघातकम्॥६७॥

जब भूमि, गौवों तथा स्त्रियों का बलात् हरण किया जाया है, और जो
(प्रत्यक्षदर्शी) इसकी सूचना राजा को नहीं देता, उसे ब्रह्मघातक कहते हैं।

निवेदितस्त् राजा वै ब्राह्मणैर्मन्युपीडितैः।

न निवारयते यस्तु तमाहुर्ब्रह्मघातकम्॥६८॥

और जो राजा क्रोध में भड़के हुए ब्राह्मणों से सूचना पाकर (हरण करने वाले
को) नहीं रोकता, उसे ब्रह्मघातक कहते हैं।

4. The Holy scripture Sri Brihashpati Smriti (contained in Vol.33 of the Sacred Books of the East titled as 'The Minor Law Books' edited by F. Max Muller & translated by Julius Jolly, 1st Edition, 1889 reprinted Edn. 1988 published by Motilal Banarsidass, Delhi) in its Chapter-IX says that the wealth possessed by a son-in-law, a learned Brahmin, or by the King or his Ministers does not become legitimate property for them even after a lapse of a very long period. Even slight measure of possession of a grant keeps title alive. By way of possession no one acquires ownership over the property of a King or learned Brahmin or an idiot or infant. Translation of relevant slokes being nos.12, 13, 14, 18, 21, 22 and 30 read as follows:

“12. Such wealth as is possessed by a son-in-law, a learned Brahman, or by the king or his ministers, does not become legitimate property for them after the lapse of a very long period even.

13. Forcible means must not be resorted to by the present occupant or his son, in maintaining possession of the property of an infant, or of a learned Brahman, or of that which has been legitimately inherited from a father,

14. Nor (in maintaining possession) of cattle, a woman, a slave, or other (property). This is a legal rule.

18. When a village, field, or garden is referred to in one and the same grant, they are (considered to be) possessed of all of them though possession be held of part of them only. (On the other hand) that title has no force which is not accompanied by a slight measure of possession even.

21. Female slaves can never be acquired by possession, without a written title; nor (does possession create ownership) in the case of property belonging to a king, or to a learned Brahman, or to an idiot, or infant.

22. It is not by mere force of possession that land becomes a man's property; a legitimate title also having been proved, it is converted into property by both (possession and title), but not otherwise.

30. He whose possession has passed through three lives and has been inherited from his ancestors cannot be deprived of it, unless a previous grant should be in existence (in which the same property has been granted to a different person by the king).”

5. The Holy Scripture Sri Shukraniti (translated by Dr. Jagdish Chandra Mishra and published by Chaukhamba Surbharati Prakashan, Varanasi, Edn. 1998) in its fourth chapter says that on the basis of adverse possession no one can acquire ownership over the mortgaged land, frontier land of a village, minor's property, pledge, women's property, King's property or the property of the Brahmin who recites Vedas (*Shrotriya*). Sloke 225 of the said chapter along with its translation reads as follows:

आधिः सीमा बालधनं निक्षेपोपनिधिस्तथा।

राजस्वं श्रोत्रियस्वं च न भोगेन प्रणश्यति॥२२५॥

अन्वय— आधि, सीमा, बालधनं, निक्षेपः तथा उपनिधिः, राजस्वं च श्रोत्रियस्वं भोगेन न प्रणश्यति॥२२५॥

व्याख्या— आधिः— बन्धकधनम्, सीमा— ग्रामसीमा, बालधनम्— अवयस्कस्य शिशोः धनम्, निक्षेपः—न्यासः, तथा— तेनैव प्रकारेण, उपनिधि— उपन्यस्तं वस्तु, राजस्वम्— नृपाधिपत्यम्, श्रोत्रियस्वम्— वेदपाठकस्य धनम्, भोगेन— उपभोगेन, न— नहि, प्रणश्यति— विनष्टी भवति॥२२५॥

6. The Holy Scripture Sri Naradasmriti (compiled in the book 'The Minor Law Books' edited by F. Max Muller & translated by Richard W. Lariviere, 1st Edition, 1889 reprinted Edn. 1988 published by Motilal Banarsidass, Delhi) lays down that a learned Brahmin's property, the King's property etc. are not

lost through possession. The King should punish that sinner who has possession even for hundreds of years without title, as if he was a thief. The translation of the relevant sloke nos.73 and 76 read as follows:

“73. A pledge, a boundary, the property of children, unsealed and sealed deposits, women, the king’s property, and a learned brahmana’s property are not lost through possession.

76. If there is possession but no title, in that case the absence of a title, not the possession, is conclusive.”

7. The Holy Scripture Sri Manusmriti (with the Commentary of Medhatithi, translated by Ganganath Jha & published by Motilal Banarasi Dass Publishers Pvt. Ltd.) in its 8th chapter inter alia says that the property of a Vedic Scholar is not lost by adverse possession. Relevant sloke nos. 149 of the said chapter along with commentary of Medhatithi and its English translation read as follows:

“149. A pledge, a boundary, minor’s property, a deposit, a property enjoyed by favour, women, king’s property, and the property of a vedic scholar are not lost by adverse possession.”

8. The Holy Scripture Sri Yajnavalkya Smriti (with Mitakshara commentary and Hindi translation published by Chaukhambha Sanskrit Samsthan, Varanasi, Edn. 1994) in its chapter II lays down that the title of the property of *Shrotriya* i. e. the learned Brahmin versed in Veda as well as minor’s property etc. cannot be lost by way of adverse possession, which is reproduced as follows:

आधिसोमोपनिक्षेपजडबालनैर्विना ।

तथोपनिधिराजस्त्रीश्रोत्रियाणां धनैरपि ॥२५॥

आधिश्च सीमा च उपनिक्षेपश्च आधिसीमोपनिक्षेपाः । जडश्च बालश्च जडबालौ, तयोर्धने जडबालधने, आधिसीमोपनिक्षेपाश्च जडबालधने च आधिसीमोपनिक्षेपजडबालधनानि तैर्विना । उपनिक्षेपो नाम रूपकसंख्याप्रदर्शनेन रक्षणार्थं परस्य हस्ते निहितं द्रव्यम् । यथाह नारदः— स्वं द्रव्यं यत्र विस्रम्भान्निक्षिपत्यविशंकितः । निक्षेपो नाम तत्प्रोक्तं व्यवहारपदं बुधैः । इति उपनिधनमुपनिधिः । अध्यादिषु पश्यतोऽबुवतोऽपि भूमेर्विशतेरूर्ध्वं धनस्य च दशभ्योवर्षेभ्यः ऊर्ध्वमप्युपचयहानिर्न भवति; पुरुषापराधस्य तथाविश्वस्याभावात्, उपेक्षाकारणस्य तत्र तत्र संभवात् । तथा हि— आधेराधित्वोपाधिक एवं भोग इत्युपेक्षायामपि न पुरुषापराधः । सीम्नश्चिरकृततुषाङ्गारादिचिह्नैः सुसाध्यात्वादुपेक्षा संभवति; उपनिक्षेपोपनिध्योर्भुक्तेः प्रतिषिद्धत्वात्, प्रतिषेधाति क्रमोपभोगे च सोदयफललाभादुपेक्षोपपत्तिः । जडबालयोर्जडत्वाद्बालत्वादुपेक्षा युक्तैव; राज्ञो बहुकार्यव्याकुलत्वात्, स्त्रीणामज्ञानादप्रागलभ्याच्च । श्रोत्रिय-स्याध्ययनाध्यापनत दर्थविचारानुष्ठा नव्याकुलत्वादुपेक्षा युक्तैव । तस्मादाध्यादिषु सर्वत्रोपेक्षाकारणसंभवात्समक्षभोगे निराक्रोशे च न कदाचिदपि फलहानिः ॥२५॥

भाषा- आधि (बन्धक), सीमा, उपनिक्षेप, जड़ (मन्दबुद्धि), बालक का धन, उपनिधि, राजधन, स्त्रीधन, श्रोत्रिय का धन दूसरे द्वारा दस या बीस वर्ष तक भोगे जाने पर भी अपने स्वामी के अधिकार से हीन नहीं होते हैं।

9. The aforesaid rule of non applicability of rule of adverse possession in respect of Debutter property was all along being complied by Hindu Kings which is very much apparent from various inscriptions of the Kings of ancient and medieval periods. Bitragunta grant of Samgama II of Saka-Samvat 1278 (4th plate, verse nos.36 – 39), Torkhede copper plate grant of Govindraja of Saka-Samvat 735 (3rd plate, line nos.43 to 48) and Chicacole Plates of Gunarnava's son Devendravarman of the year 183 (2nd and 3rd Plates, line nos.19 – 23) with slight variation reproduce the sloke nos.25, 26, 28 & 29 of the Holy scripture Brihaspatismriti. Transliteration and translation of the Original Sanskrit Text of the Line Nos. 43 to 48 of the Torkhede copper plate grant of the time of Govindaraja of Gujrat of Saka-Samvat 735 corresponding to 813 AD. reads as follows:

“43. Chchhiddra-nyayen=adya vijaya-saptamyam-udak-atisarggena pratipade-tah [1*] yata-

44. s=tato=sya na kaischid=vyasedhe pravarttitavyam=agami-bhaddra-nripati-bhir=apy=anitya

45. ny(ny)=aisvaryyany=asthirain manushyam samanyan=cha bhumi-dana-phalam tad-apaharana-papam

46. ch=avagachchhaddbhir=ayam=asmad-dayo=numamtavyah paripalayitavyas=cha [1*]

47 Bahubhir=vvasudha bhukta rajabhih Sagar-adibhih yasya yasya jada

48 Shashtim varsha-sahasraji svargge tishthati bhumi-dah schschetta ch= annmanta cha tany=eva narake vased=iti [II*]”

English translation whereof reads as follows:

“(L.43.) “Wherefore, no one should behave so as to restrain this grant. And this, Our gift, should be assented to, and preserved by, future benevolent kings; understanding that riches are not everlasting, (and) that man's estate is uncertain, and that the reward of a grant of land belongs in common (both to him who makes it, and to him who continues it), and understanding also the sin of confiscation it.

(L.46.) “And it has been said by the great sages- The earth has been enjoyed by many kings, commencing with Sagara; whosoever at any time possesses the earth, to him belongs, at that time, the reward (of the grant that is now made, if he continues it)! The giver of land abides in heaves for sixty thousand years; (but) the confiscator (of a grant), or he who assents (to an act of confiscation), shall dwell for the same number of years in hell!”

10. In *Vishwajit Yajna* King was to donate/gift everything of which he was owner, but he had no right to donate/gift lands of his subjects as well as common land such as Roads, Streets, water reservoirs, forest, mountains, temples etc. as he is not owner of the those lands and, in lieu of giving protection to his subjects king was entitled to collect only certain part of produce of his subject's lands; it is considered dictum of Jaminiya-Mimamsa-Bhashyam (6.7.1-3) of Sabarswami with Hindi explanation of Yudhisthir Mimamsak published by Ramlal Kapoor Trust, Haryana 1986 Edn. read with Adhwar Mimamsa-Kutuhallvritti *Dwitiya Bhag* on (6.7.1-3) published by Lalbahadur Shastri Rashtriya Sanskrit Vidyapeetham, Delhi 1969-77 Edn. and Marxvad aur ramrajya of Sri Swami Karpatriji Maharaj 1st published in 1957 and 7th Edn. V.S. 2046 equivalent to 1989 A.D. Relevant extracts from the aforesaid books are given hereunder.

Jaminiya-Mimamsa Sutra 6.7.1 and *Bhashyam* (Commentary) of Sabarswami reads as follows:

यस्य वा प्रभुः स्यादितरस्याशक्तत्वात्॥२॥ (उ.)

वाशब्देन पक्षी विपरिवर्तते। यस्य प्रभुत्वयोगेन स्वत्वं तदेव देयं, नेतरत्। कस्मात्? प्रभुत्वयोगिनः शक्यत्वात्। इतरस्य चाशक्यत्वात्। न हि पित्रादीनां शक्यते स्वत्वं परित्यक्तुम्। ननु चोक्तं परविधेयीकरणं तस्य शक्यमिति। उच्यते। प्रभुत्वयोगिनः स्वस्यात्र दीयमानस्य सर्वत्वमुच्यते। नाप्रभुत्वयोगिनः स्वस्य दानम्। न चैतन्नयार्यं, यत् पित्रादीनां परिचारकत्वम्। यस्य चैतन्नयामपि भवेत् स दद्यादपि।

Yudhisthir Mimamsak's Hindi explanation of the aforesaid commentary reads as follows:

सूत्रार्थ - (वा) 'वा' शब्द पूर्व उक्त पक्ष की निवृत्ति करता है। दान देने वाला व्यक्ति (यस्य) जिस का (प्रभुः) स्वामी (स्यात्) होवे, उसे सर्वस्व दान में देवे। (व्रतरस्य) दूसरे के जिसका वह स्वामी नहीं है, उसके दान में (अशक्यत्वात्) अशक्य- असमर्थ होने से नहीं दे सकता।

व्याख्या- 'वा' शब्द से पक्ष परिवर्तित होता है। जिसका स्वामित्व के संबन्ध से स्वत्व है, वही देने योग्य है, अन्य (देने योग्य) नहीं है। किस हेतु से? प्रभुत्व के संबंध वाले (स्वत्व) का (देना) शक्य (सम्भव) होने से, और अन्य का देना अशक्य होने से। पिता आदि का स्वत्व (स्व-संबंध) छोड़ा नहीं जा सकता है। (आक्षेप) पूर्व कहा है- पर का आज्ञाकारी बनाया जाना तो सम्भव है। (समाधान) स्वामित्व संबंधी दीयमान स्ववस्तु का ही यहां सर्वत्व कहा जाता है। जिसका स्वामित्व संबंध नहीं है, ऐसी स्ववस्तु का दान नहीं कहा जाता है। यह न्याय भी नहीं है, जो पिता आदि का परिचारकत्व (सेवकत्व) है। जिसका वह न्याय्य होवे सो दे भी सकता है।

Jaminiya-Mimamsa Sutra 6.7.3 and *Bhashyam* (Commentary) of Sabarswami reads as follows:

न भूमिः स्यात् सर्वान् प्रत्यविशिष्टत्वात्॥३॥ (उ.)

न भूमिर्देयेति। कुतः? क्षेत्राणामीशितारो मनुष्या दृश्यन्ते, न कृत्स्नस्य पृथिवीगोलकस्येति। आह। य इदानीं सार्वभौमः स तर्हि दास्यति। सोऽपि नेति ब्रूमः कुतः? यावता भोगेन सार्वभौमो भूमेरीष्टे, तावताऽन्योऽपि। न तत्र कश्चिद्विशेषः। सार्वभौमस्य त्वेतदधिकं, यदसौ पृथिव्यां संभूतानां ब्रह्मादीनां रक्षणेन निर्विष्टस्य कस्यचिद्भागस्येष्टे, न भूमे; तन्निर्विष्टाश्च ये मनुष्यास्तैरेन्यत् सर्वप्राणिनां धारणचक्रमणादि यद्भूमिकृतं, तत्रेशित्वं प्रति न कश्चिद् विशेषः तस्मान्न भूमिर्देया॥३॥ विश्वजिति भूमेरदेयत्वाधिकरणम्॥३॥

Yudhisthir Mimamsak's Hindi explanation of the aforesaid commentary reads as follows:

सूत्रार्थ— (भूमिः), भूमि देय (न) नहीं (स्यात्) होवे, (सर्वान् प्रति) सब के प्रति (अविशिष्टत्वात्) सामान्य होने से (सब की साझी होने से)।

व्याख्या— भूमि देय नहीं है। किस हेतु से? खेतों के स्वामी मनुष्य देखे जाते हैं। सम्पूर्ण पृथिवीगोलक के नहीं देखे जाते हैं। (आक्षेप) जो सार्वभौम (राजा) है वह देगा (भूमि का दान करेगा)। (समाधान) वह भी नहीं देगा, ऐसा हम कहते हैं। किस हेतु से? कितने भोग से सार्वभौम राजा भूमि का स्वामी होता है उतने से अन्य भी स्वामी होता है। उसमें कुछ विशेष नहीं है। सार्वभौम राजा का यह अधिक है, जो यह पृथिवी में उत्पन्न हुए व्रीहि आदि के रक्षण से प्राप्त किसी भाग का स्वामी होता है, उसमें रहने वाले जो मनुष्य हैं उनसे, सब प्राणियों के धारण गमन आदि जो अन्य भूमिकृत (व्यापार है) उसमें स्वामित्व के प्रति कोई विशेष नहीं है। इससे भूमि देय नहीं है।

Yudhisthir Mimamsak's Hindi explanation of *Kutuhāl Vṛtti* on *Jaminiya-Mimamsa Sūtra* 6.7.3 reads as follows:

विशेष- कुतूहलवृत्ति में लिखा है— भूमि गोपथ (पगदण्डी), राजपथ (सड़क), जलाशय, वन, पर्वत आदि से युक्त होती है। इस प्रकार की भूमि पर किसी का स्वामित्व नहीं होता है। (राजा का कार्य केवल) कण्टक उद्धरणमात्र है। उस भूमि से (अथवा-कण्टकोद्धरण से) उत्पन्न फल का ग्रहण ही राजा का भूमि के प्रति स्वामित्व है। गोपथ आदि में साधारण होने से॥३॥

Original Text of the Kutuhāl Vṛtti on *Jaminiya-Mimamsa Sūtra* 6.7.3 reads as follows:

न भूमिस्स्यात् सर्वान्प्रत्यविशिष्टत्वात्॥३॥

(भूमिर्न देया स्यात्, तस्यास्सर्वान् प्रत्यविशिष्टत्वात्)। भूमिर्हि गोपथराजपथराजजलाशय वन पर्वतादियुक्ता। तादृश्याश्च न कस्यापि स्वामित्वम्, किन्तु कण्टकोद्धरणमात्रम्। राज्ञः तदुत्पन्नफलादानं हिं भूमिं प्रति स्वामित्वम्। न हि गोपथादौ स्वामित्वमस्ति, गोपथादेस्साधारणत्वात्। अतो महापृथ्वी न देया, किन्तु वास्तुक्षेत्रादिकमेवेति॥

Explanation of Sri Swami Karpatriji Maharaj on Jaminiya-Mimamsa Sūtra 6.7.3 in his book 'Marxvad Aur Ramrajya' reads as follows:

न भूमिर्देया स्यात् सर्वान् प्रत्यविशिष्टत्वात्।

अर्थात् राजमार्ग, चत्वर, देवादि स्थानसहित अखण्डभूमिका दान नहीं हो सकता, क्योंकि वह सबकी है। यद्यपि यहां कुछ लोगों ने इसी आधार पर यह भी सिद्ध किया है कि भूमि किसी व्यक्ति की नहीं होती, किंतु वह समाज की होती है, इसी से उसका दान नहीं हो सकता, किंतु पूर्वापर देखने से यह गलत सिद्ध होता है। उसका अभिप्राय इतना ही है कि चत्वर, राजमार्गादिसहित भूमिका दान नहीं हो सकता, क्योंकि हो सकता है कि प्रतिग्रहीता राजमार्ग में ही खेत, उद्यान बनाये और दूसरोंको चलने से रोके। अतः अखण्ड भूमंडल का दान नहीं हो सकता। हाँ, देवस्थान, चत्वर, राजमार्गादि छोड़कर समस्त भूमिका दान शतपथ, ऐतरेय आदि में स्पष्ट वर्णित है।

11. The Satpath Brahman commands that King cannot gift or donate the land of the Brahmins as to the sacrificial fee, from which it is crystal clear that the Debutter property which was all along being held by the Brahmin sebit for service worship of Deities for and on behalf of the Deities was not within the proprietorship of the King. The relevant extract from the Satpath Brahman XIII.6.2.18 translated by Julius Eggeling, Edited by F. Maxmuller and published by Motilal Banarsidass Publishers Pvt. Ltd., Delhi, reprinted Edn. 2002 of 1st Edn. 1900 being volume 44 of the series Sacred Books from the East reads as follows:

“18. Now as to the sacrificial fees. What there is towards the middle of the kingdom other than the land and the property of the Brahmana, but including the men, of that the eastern quarter belongs to the Hotri, the southern to the Brahman, the western to the Adhvaryu, and the northern to the Udgatri; and the Hotrikas share this along with them.”

Satpath Brahman XIII.6.2.18 Ibid p. 412

It means land and property of Brahmins which includes debutter property can not be gifted by the King as it is always under the ownership of Almighty or revenue free but revenue of the land and tax on the properties of other three Varnas was within the purview of the King's gift.

12. The Holy Scripture Sri Bandhayana Dharmasutra (1.18.1,14,15,16) Says that King is entitled for 1/6th taxes for protecting His subjects. Tax should not be oppressive. The King can not appropriate property of Brahmin even he has disappeared. Here according to interpretation of Manu by Medhatithi, the property of Brahmin means property given to the Brahmin for performing service and worship of deities. From this provision it is crystal clear that in respect of Debutter Property according to Hindu Law provision of Adverse Possession or Doctrine of Escheat were not applicable. Sutra nos. 1,14,15 & 16 of 18th *Khanda's Pratham Prashna* of Sri Baudhayana Dharm Sutra from page 233 of the book “DHARMSUTRAS The Law Codes of Apastamba, Gautama, Baudhayana, and Vasistha” annotated and translated by Patrick Olivelle reprinted edn.2003 published by Motilal Banarasidass Publishers Pvt. Ltd. read as follows:

“Receiving one sixth as taxes, a king should protect his subjects.”

(BAUDHAYANA DHARMASUTRA 1.18.1)

“The duty on goods imported by sea is 10 per cent plus a choice piece of merchandise.”

(BAUDHAYANA DHARMASUTRA 1.18.14)

“He should assess an equitable tax also on other types of merchandise corresponding to their value, a tax that would not be oppressive.”

(BAUDHAYANA DHARMASUTRA 1.18.15)

“When the owner has disappeared, the king should look after his estate for one year, after which he may appropriate it, so long as it does not belong to a Brahmin.”

(BAUDHAYANA DHARMASUTRA 1.18.16)

The Holy Sacred Scripture Sri Mahabharata lays down that it is duty of the King to protect the people. King should realize 6th part as tax and act in such a way that his subjects may not feel the pressure of want. The King who does not act in accordance with the scripture fails to earn wealth and religious merit. The King who thoughtfully oppresses his subject by levying taxes not sanctioned by the scriptures, is said to wrong his own-self. By protecting a kingdom properly and ruling it by the aid of judicious men a King may succeed in always obtaining much wealth. The King adopting virtuous behaviour should protect his subjects. Protection of the subject is the highest duty of the King, since compassion to all creatures and protecting them from injury is said to be the highest merit. The merit of the King earned by protecting his subjects rightly for a single day is such that he enjoys this reward for 10,000 years. After subjugating dominions of other King the King should say to all the people that "I am your King and shall always protect you." If the people accept him as their King, there need not be any fighting. Relevant extracts from page nos. 119-20, 157-59 & 206 of Volume III of "The Mahabharata" of Sri Krishna-Dwaipayana Vyasa Translated into English prose from the Original Sanskrit Text by Kisari Mohan Ganguli 3rd Edn. 2004 Published by Munshiram Manoharlal Publishers Pvt. Ltd.

"Bhishma said, 'Protection of the subject, O Yudhishtira, is the very essence of kingly duties. The divine Vrihaspati does not applaud any other duty (so much as this one). The divine Kavi (Usanas) of large eyes and austere penances, the thousand-eyed Indra, and Manu the son of Prachetas, the divine Bhadrawaja, and the sage Gaurasiras, all devoted to Brahma and utterers of Brahma, have composed treatises on the duties of Kings. All of them praise the duty of protection, O foremost of virtuous persons in respect of kings. O thou of eyes like lotus leaves and of the hue of copper listen to the means by which protection may be secured."

Mahabharata: Shantiparv VIII.LVIII Ibid p.119-20

"With a sixth part upon fair calculation, of the yield of the soil as his tribute, with fines and forfeitures levied upon offenders, with the imposts, according to the scriptures, upon merchants and traders in return for the protection granted to them, a king should fill his treasury. Realising this just tribute and governing the kingdom properly the king should, with heedfulness, act in such a way that his subjects may not feel the pressure of want. Men become deeply devoted to that king who discharges the duty of protection properly, who is endued with liberality, who is steady in the observance of righteousness, who is vigilant, and who is free from lust and hate. Never desire to fill thy treasury by acting unrighteously or from covetousness. That king who does not act in accordance with the scriptures fails to earn wealth and religious merit.

Mahabharata: Shantiparv VIII.LXXI Ibid p.157-58

Persons conversant with duties regard that to be the highest merit of the king, when, engaged in protecting all creatures, the king displays compassion towards them. The king incurs by neglecting for a single day to protect his subjects from fear a thousand year. The merit

a king earns by protecting his subjects righteously for a single day is such that he enjoys its reward in heaven for ten thousand years. All those regions that are acquired by persons leading duly the Garhasthya, the Brahmacharya, and the Vanaprastha modes of life, are soon acquired by only protecting his subjects righteously. Do thou, O son of Kunti, observe with great care this duty (of protection). Thou shalt then obtain the reward of righteousness and no grief and pain will be thine. Thou shalt, O son of pandu obtain great prosperity in heaven. Merit like this is impossible to be acquired by persons that are not kings."

Mahabharata: Shantiparv VIII.LXXI Ibid p.158-59

"Yudhishtira said, 'If a Kshatriya desires to subjugate another Kshatriya in battle, how should the former act in the matter of that victory? Questioned by me, do thou answer it.'

"Bhishma said, 'the king or without an army at his back, entering the dominions of the king he would subjugate, should say unto all the people. 'I am your king. I shall always protect you. Give me the just tribute or encounter me in battel.' If the people accept him for their king, there need not be any fighting. If without being Kshatriyas by birth, they show signs of hostility, they should then, observant as they are of practices not laid down for them. be sought to be restrained by every means. People of the other orders do take up arms (for resisting the invader) if they behold the Kshatriya unarmed for fight, incapable of protecting himself, and making too much of the enemy.'"(ibid p.-63)

Mahabharata: Shantiparv VIII.XCV Ibid p.206

14. In the book 'Travels of Fah-Hian and Sung-Yun from China to India (400 AD and 518 AD) translated by Samuel Beal, and published by Low Price Publication, Delhi, reprinted Edn. 2005 of the 1st Edn. 1869 Fah-Hian writes that the King were giving grants to Idol Temples with instruction to future Kings to maintain said endowment. Relevant extract from page 55 of the said book reads as follows:

"From the time of Buddha's Nirvana, the kings and nobles of all these countries began to erect Viharas for the priesthood, and to endow them with lands, gardens, houses, and also men and oxen to cultivate them. The Records of these endowments, being engraved on sheets of copper have been handed down from one king to another, so that no one has dared to deprive them of possession, and they continue to this day to enjoy their proper Revenue."

(Ibid. p.55)

5. Ibn Battuta writes that in the city of Dinawar, there was a vast temple in which a thousand Brahmins and Yogis and others were engaged in service of the idol and revenue of the city was endowed to the idol. Relevant extract from page 260 of the book 'Ibn Battuta's travels in Asia and Africa 1325-1354, translated by H.A.R. Gibb, reprint Edn. 2007, published by Low Price Publications, Delhi 1st Edn.1929 from reads as follows:

"We travelled thence to Dinawar, a large town on the coast, inhabited by merchants. In this town there is an idol, known as Dinawar, in a

vast temple, in which there are about a thousand Brahmans and Yogis, and about five hundred women, daughters of the infidels, who sing and dance every night in front of the idol. The city and all its revenues form an endowment belonging to the idol, from which all who live in the temple and who visit it are supplied with food. The idol itself is of gold, about a man's height, and in the place of its eyes it has two great rubies, which, as I was told, shine at night like lamps."

Ibn Battuta's travels in Asia and Africa p.260

16. History of Kings of Kashmir Rajtarigini of Kalhana written in 1148 A.D. records that King Chandrapid did not forcefully acquire land of a leather worker for completion of Tribhuvanasvamin's temple and when the said leather worker put condition that if the King would go to his house and ask for handing over said land, only then he would give land to the King; the judicious King complied with said condition and after purchasing said land the King consecrated the image of Kesava as Tribhuvanasvamin. From which instance it is clear that neither Hindu Kings were owners of the land of the subject people nor there was scriptural sanction to erect Temple on forcefully acquired others' land. Relevant extracts from page 123 of the Rajtarigini, written by Kalhana in the year 1148 translated into English by Ranjit Sitaram Pandit, and published by Sahitya Akademi reprint 1990, 1st published in 1935) read as follows:

"By that king, who showed the way of justice, was established legal procedure, free from laxity as the sun wards off the Mandehas from his diurnal course.

If the brake is applied to this narrative in the recital of his virtues, it is in order to check prolixity but not because so much only was available.

When he began the construction of the temple of Tribhuvanasvamin, a certain leather worker would not give up his hut which was on the suitable site.

Though he had been constantly promised money by the officials in charge of the new construction he, who was in the grip of his native obstinacy, did not brook the laying down of the measuring line.

Thereupon they approached the lord of the earth and reported this matter, he, however, held them to be at fault but not that tanner.

He exclaimed, "Fie on their lack of foresight that they should, without first having asked him, have entered upon the new construction."

Stop the construction or build somewhere else; by seizing the land of another who would tarnish an act of piety!

If we ourselves, who are the judges of what is right and unright, enforce procedure which is unlawful who should tread the path which is according to law.

While the king was speaking in this wise, a messenger sent by the cabinet of ministers on behalf of that shoemaker arrived and prayed.

He wishes to see the liege-lord but he says, "If it is not the correct thing for me to enter the hall of audience then let this be during the hour of the vestibule session.

The next day he was given an audience by the king outside and was asked, "why art thou the sole hindrance in our work of piety.

If that house appeals to thee as charming then thou mayst apply for one better than that or in the alternative for a large sum of money" thus it was put to him.

Thereupon to the king who remained silent the tanner, who was as it were endeavouring to gauge the measure of his probity the lines of rays from his gleaming teeth, prayed.

'O King! For what I am about to submit which is straight from the heart, you should not be prejudiced since you are the judge in this matter.

I am not less than a dog nor is the king greater than Ramchandra; why then do the councilors to-day get agitated, as it were, at this private talk between the two of us?"

In the mundane existence the body of the being, which has had its birth, is a fragile armour and is fastened with only to claps called the instinct of self and the possessory instinct.

As in the case of Your Highness who is resplendent with bracelets, armlets, necklaces and the like we, too, who own nothing are proud of our own body.

Just as much as this palace, joyous with the gleaming stucco, is to your Majesty, the cottage, where the window is made of the mouth of an earthen pot is to me.

Since my birth this little cottage has been the witness, like a mother, of both happiness and unhappiness; I could not bear to see it today leveled to the ground.

The distress of mankind at the seizure of their dwelling-house, either an immortal fallen from the Vimana or a king deposed from sovereignty is capable of describing it.

Notwithstanding this, if after coming to my dwelling Your Majesty were to ask for it, yielding to the rule of good manners it would be the proper thing for me to give it.'

When he had given the reply in this way, the king after going to his place purchased the cottage with money; there is no pride for those who are seekers after bliss.

And the leather worker spoke to him at that place with hands folded hollow, "O King! Yielding to another under the compelling influence of the Law is proper on your part.

As in the past that of Pandu's son by Dharma in the form of a dog, so by me who am an Untouchable has been tested today the righteousness in your case.

Hail to you! Long may you live to exhibit such a series of upright acts according to law if to be relied upon by the law-officers."

In this manner the King, whose conduct was stainless, sanctified the land by the consecration of the image of Kesava as Tribhuvanasvamin."

PART - IV

DEBUTTER PROPERTY - CEREMONY OF DEDICATION NOT ESSENTIAL, DEDICATION IS ALWAYS FOR INVISIBLE POWER WHO IS JURIDICAL ENTITY IDOL WHEREOF IS ONLY MANIFESTATION, DESTRUCTION OF IDOL DOES NOT DESTROY ENDOWMENT, DEITY CANNOT BE SHIFTED TO OTHER PLACE, RIGHT OF THE IDOLS, WORSHIPERS AND SEBAITS' IN RESPECT OF DEBUTTER PROPERTY:

1. Celebrated Jurist Golapchandra Sarkar, Sastri in His book Treatise on Hindu Law (6th Edition, published by Eastern Law House in 1927) writes that Debutter Property is a property donated for the purpose of Dharma within Vedi (sacrificial altar) in *Ishta* form ultimate beneficiary of which are worshippers. The destruction of an image does not destroy the endowment. Invisible spirit, not material image, juridical person. Relevant extracts from said book read as follows:

“When a Hindu gifts property for the purpose of *Dharma* he intends to secure Dharma in the sense of religious merit by appropriating or applying the property for the benefit of man in two forms, namely, *ishta* or *purta* i.e. religious or charitable; but charity underlies both as *Dharma* consists in donation or charity and the compound terms *Dana-Dharma* shows that *dharma* is in this connection identical with *dana* i.e. donation or charity which is called *istha* or *antor-vedik*, i.e., made within the sacrificial alter, and *purta* or *vahir-vedica*, i.e., made outside the altar or non-sacrificial; so that the gift of property for a religious purpose must necessarily be charitable.

[*Ibid* at p.757]

“It should be observed that the destruction of an image does not destroy the endowment.”

[*Ibid* at p.782]

Invisible spirit, not material image, juridical person – “When a Hindu dedicates property for the worship of the deity by means of an image, which is directed to be set up and consecrated, the property is by a legal fiction deemed to be vested in a juridical, juristic or judicial (*Babaji Rao Vs. Laxman Das*, 28 B. 215, 223 = 5 Bom. L.R. 932) person. The God which is believed to be manifested in the consecrated image ought to be deemed the juridical person holding the property. The material image is merely a means of worshipping the God. The consecrated image is the body, of which the invisible spirit is the soul. The consecrated image again, apart from the spirit be regarded as forming the juridical person: for when it becomes damaged or an invalid or worship and is to be replaced by another image, it must seem to be the juridical person. Where shall the property during the interval between the deities of the damage and of the restoration, except in the invisible deity for the worship of which the property was decayed ?”

[*Ibid* at p.782-83]

“There seems to be a mis-apprehension and misconception of the ideas and intention of Hindus making gifts of property for religious purpose

to be carried out by the consecration of image. This reading appears to be based on the assumption that the case is made to the material image to be established after donor's death, whereas in reality is the gifts are made to place the invisible deity believed to reside in, and is spiritual consecrated image, properly speaking no gift can be made to the deity; for how can a man make a gift of property to the God who has created him and the property which by an illusion or delusion he thinks himself to be the owner of for a few days? Neither the invisible spirit nor the consecrated image can be deemed to become owner of property for gift of property made to worship them. (*Bhupati Vs. Ramlal* 10 CLJ 355 = 3 IC 642 Full Bench). Besides it seems to be overlooked the rules against perpetuity and remoteness did not apply to gift for religious and charitable purpose. This is expressly stated in the Transfer of Property Act, Section 17 with respect to gifts enter vivos; and the same principle is applicable to gift by Will which are deemed as gift on the last moment of the lives of Hindus (*Parbati v. Ram* 31C895 = 8CWN653).

[Treatise on Hindu Law by Golapchandra Sarkar, Sastri 6th Edition, published by Easter Law House in 1927 at p.784-85]

2. Jurist of fame Dr. Sir Hari Singh Gaur in his book *The Hindu Code* (6th Edition, 1992 published by Law Publishers (India) Pvt. Ltd.) writes that *Debutter* property is property dedicated to a God or Gods. An idol, a muth or a temple is a juridical person and can hold property but it is, a person in perpetual minority and requires someone to manage its estate. The destruction of an idol does not destroy the endowment since the endowment is not to the idol but to the God of which it is a visible symbol. The beneficiary of an endowment may be any religious or charitable object, such as, a *muth*, temple or shrine, an idol, public or private, or a charitable object. When the *shebait* acts adversely to its interest and fails to take action to safeguard its interest, decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. Relevant extracts from said book read as follows:

“1978. *Debutter* property is property dedicated to a God or Gods. An idol, a muth or a temple is a juridical person and can hold property. Under the Hindu Law an idol is a juristic person capable of holding property and the properties endowed for the institution vest in it. It is only in an ideal sense that the idol is the owner of the endowed properties. But it is, a person in perpetual minority and requires some one to manage its estate. The destruction of an idol does not destroy the endowment since the endowment is not to the idol but to the God of which it is a visible symbol.”

(*Ibid* 631)

“2057. Must observe customary usages. — “It is the duty of the trustee or manager to maintain the customary usages of the institution, and if he fails to do so, he isguilty of a breach of trust, and still more so, if he deliberately attempts to effect a vital change of usage and make it binding on the worshippers, by obtaining a decree of the court to establish it.”

(Ibid 674)

"281. (1) The beneficiary of an endowment may be any religious or charitable object, such as, a *muth*, temple or shrine, an idol, public or private, or a charitable object, such as, a *dharmsala*, *sarai*, *pinjrapole* (a shed for the protection of cattle) or the like.

(2) In the case of a public endowment all persons directly or indirectly interested therein, whether they be *shebait*, worshippers or the like, are entitled to take such steps as are necessary to ensure that the endowment is maintained and its legitimate functions are preserved.

(3) Worshippers and devotees of a public idol or temple or other sacred object or institution are entitled to resort to it, singly or jointly in procession, at all reasonable hours for the purpose of worship and devotion, and the manager is bound to afford them reasonable facilities for that purpose.

(4) Where the idol, shrine or temple is private only, such persons are entitled to worship and receive its benefits as are members of the family sect or class for whose benefits and worship the founder had installed the image or constructed the temple."

(Ibid.p.702-703)

"Three legal concepts are well settled: (1) An idol of a Hindu temple is a juridical person, (2) when there is a *shebait*, ordinarily no person other than the *shebait* can represent the idol, and (3) worshippers of an idol are its beneficiaries, though only in a spiritual sense. It has also been held that persons who go in only for the purpose of devotion have according to Hindu law and religion, a greater and deeper interest in temples than mere servants who serve there for some pecuniary advantage. When the *shebait* acts adversely to its interest and fails to take action to safeguard its interest, decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol."

(Ibid. p.703)

3. Well known Jurist B. K. Mukherjea in his book Hindu Law of Religious and Charitable Trusts (5th Edition, Published by Eastern Law House) writes that the conception of Hindu jurists was not that the image of clay or stone constituted juristic person. A dedication to an idol is really a dedication to the deity who is ever present and ever existent, the idol being no more than the visible image through which the deity is supposed subject to manifest itself by reason of the ceremony of the consecration. The provision of Hindu Law relating to secular gifts are, therefore, not applicable when the dedication is to the idol. Relevant extract from said book read as follows:

"Mookerjea, J. in the same case [*Bhupati Smrititirtha Vs. Ramlal* 10 CLJ 355] held that a review of the relevant texts that according to Hindu Law the rule about the acceptance of gifts as a necessary condition for its validity was applicable to secular gifts only. There is no foundation for the assumption that the dedication to deity or for religious purpose stands on the same footing. In summing up the legal position, the learned Judge observed as follows:

“ The view that no valid dedication of property can be made by a Will to a deity, the image to which is not in existence at the time of the death of the testator is based up a double fiction namely, first that the Hindu deity is for all purposes a juridical person and secondly that a dedication to the deity has same characteristics and is subject to the same restriction as a gift to a human being. The first of these propositions is too broadly stated and the second is inconsistent with the first principle of Hindu Jurisprudence.” The provision of Hindu Law relating to secular gifts are, therefore, not applicable when the dedication is to the idol. Moreover – and this was pointed out by Chatterjee, J., was a principal of the Full Bench – the conception of Hindu jurists was not that the image of clay or stone constituted juristic person. The Smriti writers have laid down that if an image is broken or lost, another may be substituted in its place when so substituted it is not a new personality but the same deity and property is vested in the lost or mutilated *Thakur* become vested in the substituted *Thakur*. Thus, a dedication to an idol is really a dedication to the deity who is ever present and ever existent, the idol being no more than the visible image through which the deity is supposed subject to manifest itself by reason of the ceremony of the consecration.”

(*Ibid.* p.162)

The decision in *Bhupati Smrititirtha Vs. Ram lal* has been followed by other High Court in India, and it has been held by the Allahabad High Court in *Mohar Singh Vs. Het Singh* that a bequeath to complete the building of a temple which was commenced by the testator and to install and maintain an idol therein was a valid bequeath under the Hindu Law. The fact that the case is made by a deed *inter vivos* and not by a will does not make any difference.

(*Ibid.* p.162-63)

4. Renowned Jurist N.R. Raghavachariar in his book *Hindu Law* (4th edition published by MLJ) writes that in order to constitute a valid dedication neither execution of an instrument in writing nor the performance of the religious ceremony of *Sankalp* and *Samarpan* are legally essential for the validity or completion of the endowment. The endowment is not affected by mutilation or destruction of Idols. The religious purpose still survives and a new image may be established and consecrated. Hindu idols are not property in the crude sense of the term, and their destruction, degradation or injury is not within the power of their custodian for the time being. A Hindu idol is a juristic entity and has a juridical status with the power to suing and being sued. Its interests are attended to by a *Shebait*. In the case of an idol in a public temple, the shebait has no power of removal. Temple's renovation is permissible. The responsibility of serving the Idol is of a pious Hindu, either by the personal performance of the religious rites or by the employment of a Brahmin priest to do them on his behalf. The worshippers of the idol who are thereby provided with opportunities for acquiring spiritual benefits by worshipping at the temple are real beneficiary and in exigency they can Sue for protecting or recovering the property of the Deity. Relevant extract from the said books read as follows:

569. Religious or charitable endowment.—

Even in the case of endowment to an idol it cannot be said that any benefit is conferred upon God. It is only in an ideal sense that the idol is regarded as the owner of the endowed properties, the real beneficiaries being the worshippers of the idol who are thereby provided with opportunities for acquiring spiritual benefits by worshipping at the temple."

(Ibid.576-577)

"575. Dedication how made.— In order to constitute a valid dedication the execution of an instrument in writing is not necessary. Nor is the performance of the religious ceremony of Sankalp and Samarpan legally essential for the validity or completion of the endowment. In many cases dedication is a matter of inference from a long course of conduct, from user and from the application of the income of the property about which the endowment is claimed, though this test is not always conclusive. The provisions of S.123 of the Transfer of Property Act, relating to gift of movable property do not apply to the case of an endowment. In the case of gifts to an idol, no express words of gift either directly or indirectly in the shape of a trust are required to create a valid dedication. All that is necessary is that the religious purposes or objects of the testator should be clearly specified and that the property intended for the endowment should be set apart for or dedicated to those purposes. Where the creation of a charitable trust under a will is invalid in law and the executor nevertheless holds the property on behalf of the trust adversely to the heirs at law for over 12 years, the title being perfected by adverse possession vests in the charity and the title of the heirs of the testator to the property becomes extinguished under S.28 of the Limitation Act."

(Ibid.579-580)

581. Destruction of image.— The religious purpose of an endowment to an idol does not come to an end when the image has been mutilated or destroyed, and as pointed out in *Purna Chandra v. Gopal Lal*, [8 CLJ 369.] the endowment is not affected by such mutilation or destruction. The religious purpose still survives and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder. Hindu idols are not property in the crude sense of the term, and their destruction, degradation or injury is not within the power of their custodian for the time being.

(Ibid.582)

582. Idol, a juristic entity.— A Hindu idol is a juristic entity and has a juridical status with the power to suing and being sued. Its interests are attended to by a person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. The duties of piety from the time of the consecration of the idol are duties of something existing, which, though symbolizing the divinity, has in the eye of the law, a status as a separate persona. The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to

be performed, be in the charge of a human being. Accordingly he is the Shebait custodian of the idol and manager of its estate and the fact that he happens to be only a de facto and not a de jure manager of the temple in which the idol is installed does not preclude the maintainability of a suit by him in the name of the idol".

(Ibid.582)

"587. Position of Shebait.— A Hindu idol, is according to long-established authority, founded upon the religion customs of the Hindus and the recognition thereof by Courts as a juristic entity. It has a juridical status with the powers of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. The person founding a deity and becoming responsible for these duties is de facto and in common parlance called, shebait. The responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or as in the case of Sudras by the employment of a Brahmin priest to do them on his behalf. Or the founder, any time before his death, or his successor likewise, may confer the office of shebait on another. The shebait is only a manager of the property which belongs to the idol and cannot claim any legal ownership therein or in its profits. In no case if the property gifted to an idol or temple conveyed to or vested in its manager, nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee, in the general sense, for maladministration. Where there are several shebait, all of them should act together, and an action by some of them only not bind the deity or institution. Where the trusteeship is vested in a family, its members cannot assert a hostile title to the trust and the fact that there had been partitions in the family and the trust properties have been treated as private properties by the members reserving only some of the properties for the upkeep of the temple and arranging for one of the members to do the puja, would not enable the other members to claim the properties as their own by adverse possession. [*Padmanabha v. Ramchandra* 1953 M. 842 = L.W. 457 = (1953) 2 M.L.J. 382].

(Ibid.584-85)

593. Removal and replacement of idol.— If in the course of a proper and unassailable administration of the worship of an idol by the shebait, it be thought that a family idol should change its location, the will of the idol itself, expressed through its guardian, the shebait, must be given effect to. But in the case of an idol in a public temple, the shebait has no such power of removal when it is objected to by the majority of the worshippers, though the Court may not interfere with such removal when it is beneficial to the whole community and is favoured by the general body of the devotees. So also an image having been once consecrated cannot be replaced by another image unless it has been unfit for worship by having become cracked, mutilated or broken. A destruction of the image does not put an end to the

endowment and the endowment can be carried on by consecrating and installing a new image in its stead.

(Ibid.p.587)

594. Renovation of the temple.— The essence of a building is its structural coherence and consistency, and if such coherence and consistency have been seriously impaired by time, and the temple is in a state of disrepair and dilapidation, though not in complete ruins, a complete renovation of the temple is justifiable under the religious law of the Hindus. The term “Jeerna” in the text indicating the condition of the temple which would justify renovation means simply “dilapidated” and not “reduced to ruins”.

(Ibid.p.587)

622. Right to worship.—Except in the case of private endowments, the devotees and worshippers of an idol or sacred object are entitled to reasonable facilities to resort to it for purpose of devotion or worship. But this right or worship in the public is not an absolutely unrestricted right. If the institution is intended for and belongs to a particular sect or caste, no one other than those belonging to that sect or caste is entitled to free access. Even amongst persons of the sect or caste to which the temples belongs, ...”

(Ibid.p.602)

624A. Right of suit.— The case law on the question as to who are the persons who are to institute suits or proceedings for the proper management of the temples or religious or charitable institutions and what are the circumstances which justify those persons in resorting to the suits or other proceedings is in a confused state complicated by numerous statutory provisions in several enactments both central and provincial. Except where there is a statutory provision to the contrary, the following may be said to have distinctive rights of suit in respect of the endowed property : (1) the idol itself being a juristic person has the right of suit against the infringement of its rights; (2) the shebait through whom the idol acts has a similar right of suit which is in normal cases even in supersession of the idol's right of suit; (3) the prospective shebait as the persons interested in the endowment; (4) worshipper of the temple and the members of the family of the founder of the endowment. The circumstances which may justify each of these to institute proceedings to safeguard the interests of the institution can easily be imagined and also the cases where any of these may have greater warrant to resort to the appropriate proceedings are considered the statutory provisions regarding the charitable and religious endowments....”

(Ibid.p.604)

5. Celebrated jurist Sir Dinshah Fardunji Mulla in book Principles of Hindu Law by (10th Edition, 1946 publish by the Eastern Law House, Calcutta) writes that Deity can sue or be sued through *Shebait*. Relevant extract from said book reads as follows:

"413. Devasthanam, Math, Shebait, Mohunt, Debutter property.—

Where property is devoted absolutely to religious purpose, in other words, wher the dedication is absolute and complete, the possession and management of the property belongs, in the case of a devasthanam or temple, to the manager of the temple, called *shebait*; and, in the case of a *math*, that is an abode for students of religion, to the head of the math, whatever suits are necessary for the protection of the property. Every such right of suit is vested in the case of temple property in the shebait, and not in the idol, and in the case of math, property in the mohunt. Property dedicated to religious uses is called *debutter* property. "Debutter" means literally 'belonging to a deity'.

Succeeding shebaites of a temple and mohunts of a math form a continuous representation of the property of the idol or of the math."

(*Ibid.* p.497)

PART - V

ALLEGED INSCRIPTIONS ARE FALSE, FABRICATED, FORGED, FICTITIOUS AND WERE NEVER FIXED ON SRI RAMJANAMSTHAN TEMPLE DESCRIBED IN PLAINT AS BABURI MOSQUE:

1. The Inscriptions alleged to be found and /or fixed on *Sri Ramajanmasthan Temple* called as *Baburi Mosque* by the Plaintiffs were never fixed on it rather they had no existence. In fact transcript alleged to be of the Inscription fixed on said Structure are false, frivolous, forged, fabricated, and manufactured. When Jesuit Priest Father Josef Tieffenthaler, a world-fame Geographer, Historian and Linguistic who has written books in Sanskrit, Latin, Arabic, Persian etc. in the year 1770 personally visited he did not found any Inscription fixed on said Structure but saw the Hindus entering in the Central Hall of the said Temple and worshipping the Vedi located therein by prostrating and circumambulating it thrice. Mr. F.E.A. Chamier, the then District Judge Faizabad who took Judicial notice of and visited the *Sri Ramjananmsthan/alleged Baburi Masjid* on 18th March 1886 also did not find any Inscription fixed thereon save and except a superscription 'Allah' on the entrance of the said Structure. From the aforesaid facts it becomes crystal clear that none of the alleged Inscriptions were in existence at least till 18th March, 1886.
2. In fact none of the persons that is to say Mr. A. Fuhrer who published three Inscriptions being Inscription Nos. XL, XLI and XLII in 1989; Mrs. A. S. Beveridge who published two Inscriptions being Inscription Nos. 'a' and 'b' in 1921; and Mr. Z.A. Desai who published three Inscriptions being Inscription Nos. XVII (a), XVII (b) and XVII (c) in 1964-65 had personally visited the 'Sri Ramjanmsthan called as Baburi Mosque by the Plaintiffs' as such question of seeing those Inscriptions fixed on said Sri Ramajanmasthan cannot and does not arise at all. A. S. Beveridge tells that the transcripts of the Inscriptions published by her were supplied to her husband from whom she got the same. Mr. Z.A. Desai points out that correct transcript of the Inscriptions were not supplied to Mr. A. Fuherer and Mr. Desai had got correct version of the destroyed Inscriptions from the estampage obtained from Sayyid Badru'l-Hasan of Fyzabad as well as from the Inscriptions rebuilt by the contractor Tehwoor Khan some times after 27th March, 1934.
3. It reflect from the Transcripts of the alleged inscriptions supplied to A. Fuhere's that 'a firmanant-like lofty strong building was erected by an auspicious noble Mir Khan under the command of Babur in the year 930 A.H. i.e. 1523 A.D. and foundation of the said building was laid down by the King of China and Turkey in presence of Babur;' while the Transcripts of the alleged inscriptions supplied to S.A. Beveridge reveal that 'under the command of Emperior Babur, good-hearted Mir Baqi built that alighting place of angels in 935 A.H. i.e. 1528-29.' Mr. Z.A. Desai's one Inscription says that 'by the order of King Babur that descending place of the Angels was built by the fortunate noble Mir Baqi'; while his other Inscription tells that 'a lofty building and lasting house (of God) was founded by Mir (and) Khan (Baqi).' The words placed within brackets are Dr. Desai's own insertions and it is needless to say that those words do not find place even in the text of the Incription procured by Mr. Z.A.Desai.

4. The Ld. Civil Judge Faizabad, Mr. A. Akhtar Ahasan who made an inspection of the Disputed Structure on 26th March 1946 and procured transcriptions of two Inscriptions fixed on it, in His Judgment dated 30.02.1946 records that '1st Inscription says 'by the order of Shah Babar, Amir Mir Baqi built the resting place of angels in 923 A.H.' i.e. 1516-17 A.D. ; while 2nd Inscription says that 'Mir Baqi of Isphahan in 935 A.H.' i.e. 1528-29 A.D.' The texts of the alleged restored Inscriptions found by said Ld. Civil Judge are at variance with that of those estampage procured by Mr. Z.A. Desai. It is noteworthy that in this Inscription Mir Baqi Isfahani has been mentioned as founder of the said Structure while in Babur-Nama, the Emperor Babur has not mentioned any Mir Baqi Esfahani in any context but he has mentioned one Baqi Taskendi. Be it mentioned herein that the Taskend is a City of Uzbekistan while Esfahan is a province of Iran as such Baqi Esfahani and Baqi Taskendi cannot be regarded as one person and , Baqi Esfahani being an stranger and unknown to the Emperor Babur can be termed with certainty a fictitious person by whom a real Structure cannot be brought into existence.
5. Father Josef Tieffenthaler, a Jesuit Missionary and noted geographer on Hindustan visited Ayodhya in 1770 did not find any Inscriptions even that superscription "*Allah*" mentioned by the Ld. District Judge in 1886. From Josef Tiffenthaler's description it appears that at that time also Hindus were worshipping inside the Ramjanmsthan Temple alleged to be converted into mosque either by Aurangzeb or by Babar. As he was not only a Missionary but an excellent Historian, Geographer and great linguistic having mastery over several languages including Arabic, Persian and Sanskrit, there was no possibility of overlooking the alleged Inscriptions by him as it would have enabled him to tell the people with certainty the name of the Tyrant Emperor who attempted to convert Sri Ramajanmasthan Temple into Mosque. English translation of a portion of his book "Descriptio Indiae" being description of Oude including the Sri Ramajanmasthan has been published on pages 312 to 317 in the " Modern Traveller, a Popular Description, Geographical, Historical, and Topographical of the Various Countries of the Globe- India. Vol. III" ; London Edn.1828 published by James Duncan and has been digitalised by Google. Relevant extracts thereof read as follows:

Its appearance, in 1770, is thus described by Tieffen Thaler: "Avad with Ajudea by the learned Hindoos, is a city of the highest Antiquity."

.....

(Ibid.312)

"The most remarkable place is that which is called *Sorgodoari*, that is to say, the heavenly temple; because they say, that Ram carried away from thence to heaven all the inhabitants of the city. The deserted town was repeopled and restored to its former condition by Bikaramajit, the famous King of Oojein. There was a temple here on the high bank of the river; but Aurangzebe, ever attentive to the propagation of faith of Mohammed, and holding the heathen in abhorrence, caused it to be demolished, and replaced it with a mosque with minarets, in order to abolish the very memory of Hindoo superstition. Another mosque has been built by the Moors, to the East of this near the *Sorgodoari* in an edifice erected by *Nabalroy*, a former Hindoo governor. But a place

more particularly famous is that which is called *Sitha Rassoce*, a table of *Sitha* (Seeta), wife of Ram; situated on an eminence to the south of the city. The emperor Aurangzebe demolished the fortress called Ramcote, and erected on the site of Mohammedan temple with a triple dome. According to others, it was erected by Baber. There are to be seen fourteen columns of black stone, five spans in height, which occupied the site of the fortress. Twelve of these columns now support the interior arcades of the mosque: the two other form part of the tomb of a certain Moor. They tell us that these columns, are rather these remains of skillfully wrought columns, were brought from the Isle of Lanca or Selendip (Ceylon) by Hanuman, King of the Monkeys. On the left is seen a square chest, raised five inches from the ground covered with lime about 5 ells in length by not more than four in breadth. The Hindoos call it *Bedi*. The cradle; and the reason is, that there formerly stood here the house in which Beshan (Vishnoo) was born in the form of Ram, and were also, they say, is three brothers were born. Afterwards, Aurangzebe or, according to others, Baber caused the place to be destroyed, in order to deprive the heathen of the opportunity of practising there their superstitions. Nevertheless, they still pay superstitious reverence to both these places; namely, to that on which the *Natal* dwelling Ram stood, by going three times around it, prostrate on the earth. The two places are surrounded with a low wall adorned with battlements. Not far from this is a place where they dig up grains of black rice changed into little stones, which are affirmed to have been hidden under ground ever since the time of Rama. On the 24th of the month of *Tshet* (Choitru), a large concourse of people celebrate here the birth-day of Ram, so famous throughout India.”

(Ibid. 313-314)

6. Josef Tieffenthaler was born at Bozen in the Tyrol, on 27th August, 1710 and died at Lucknow on 5 July, 1785. He entered the Society of Jesus 9 October, 1729, and went in 1740 to the East Indian mission where he occupied various positions, chiefly in the empire of the Great Moghul. After the suppression of the Society he remained in India, and on his death was buried in the mission cemetery at Agra, where his tombstone still stands. He was a fine scholar with an unusual talent for languages; besides his native tongue he understood Latin, Italian, Spanish, French, Hindustani, Arabic, Persian, and Sanskrit. He was the first European who wrote an exact description of Hindustan. A brief list of his works is the best proof of his extraordinary power of work and his varied scholarship. In geography, he wrote a “*Descriptio Indiae*”, that is a circumstantial description of the twenty two provinces of India, of its cities, fortresses, and the most important smaller towns, together with an exact statement of geographical positions, calculated by means of a simple quadrant. He wrote a large book on the courses of the Ganga. In history, he wrote many books. He wrote on the origin of the Hindus and their religion in Latin, expeditions of Nadir Shah to India in German, the Deeds of the Mughal Emperor Shah Alam in Persian, Incursions of the Afghans and the Conquest of Delhi in French. He wrote a book on contemporary history 1757-64. In linguistics he prepared a Sanskrit-Parsee Lexicon, treatises in Latin on the language of the Parsees, on the proper pronunciation of Latin, etc.. In the area of religion,

he wrote 'Brahmanism' and works on Indian polytheism, Indian asceticism, the religion of Parsee Islam and relations of these religions to one another. In the field of the natural sciences he wrote on astronomical observations on the sunspots and zodiacal light, studies on the Hindu astronomy, astrology and cosmology. In addition, he wrote on the descriptions and observations of the flora and fauna of India. Thus he was an intellectual giant and a linguistic wizard and not mere a traveller or a merchant who made casual remarks. His published works along with biographical notes can be lucidly gleaned from Catholic Encyclopedia (1913) and 'Christianity in India' through Wikisource and Wikipedia's website respectively. His writings and contributions also find place in the books -HUONDER, Deutsche Jesuitenmissionäre des 17. und 18. Jahrh. (Freiberg, 1899), 179; NOTI. Jos. Tieffentaller, S. J., A Forgotten Geographer of India (Bombay, 1906); HOSTEN, Jesuit Missionaries in Northern India (Calcutta, 1907).

7. The District Judge of Faizabad who visited Sri Ramjanmasthan/alleged Baburi Masjid on 18th March 1886 did not find any of the Inscriptions published by A. Fuhrer in 1989 and by A. S. Beveridge in 1921. Said Ld. Judge in his Judgment has recorded that the entrance to the enclosure was under a gateway which bore the superscription "*Allah*" immediately on the left as the platform or Chabootra of masonry occupied by the Hindus. His said finding is recorded in Judgment and Order dated 18th March 1889 passed in Civil Appeal No.27 of 1886 Mahanta Raghubardass, Mahant Janam Asthan City Oudh VS. Secretary of State of India, Court of Council and Mohd. Asghar by the said Judicial Officer Mr. F.E.A. Chamier, District Judge Faizabad which constitute pages 87 to 91 of the volume 10 of the Documents of O.O.S. No. 4 of 1989 being Volume I of the plaintiffs' documents. Relevant portion from page 89 of the said Volume being an extract of the said judgment reads as follows:

"I visited the land in dispute yesterday, in the presence of all parties. I found that the Masjid built by the Emperor Babar stands on the border of the town Ajudhia-that is to say to the west and south it is clean of inhabitations. It is most unfortunate that a Masjid should have been built on land specially held sacred by the Hindus, but as the event occurred 356 years ago it is too late now to remedy the grievance all that can be done is to maintain the parties in status quo. In such a case as the present one any (Sic) would cause more harm and damage (Sic) of order than benefit. The entrance to the enclosure is under a gateway which bears the superscription "*Allah*" immediately on the left as the platform or Chabootra of masonry occupied by the Hindus. On this is a small superstructure of wood in the form of a tent. This "Chabootra" is said to indicate the birthplace of Ram Chan deer. Infront of the gateway in the entry to masonry Platform of the Musjid. A wall pierced (*illegible*) and therewith railings divides the platform of the Musjid from the enclosure in which stands the "Chabootra"."

Be it mentioned herein that said judgment is Judgment per Incuriam as it has been passed in ignoratum of law. Prior to annexation of Oudh to British Rule the Law of Shar was law in force which law neither had rule of Limitation nor

did recognise adverse possession. Apart from this Hindu law in respect of Debutter property also did not recognise adverse possession. This principle of Law had already been laid down by the Indian Courts of Record as well as Privy Council, London as such said judgment passed in ignoratum of those judicial pronouncement has no force of law. Moreover in the said Suit the Disputed Structure was not subject matter of that suit nor was declaration of title in respect thereof prayed for.

8. In the aforesaid judgment recording of the Ld. Judge the entrance had the superscription "Allah" leaves no doubt that he had inspected the disputed premises and Structure very minutely and it is needless to say that if there would have been alleged Inscriptions that would not have gone unnoticed by him. Be it mentioned herein that according to Hindus' sacred book "Allopanishad" "Allah" is one of the several names of the almighty. Be it mentioned herein that the "Allopanishad" has been reproduced by the founder of Arya Samaj Maharshi Dayanand Saraswati in his book "Satyarthaprakash" 2nd revised edition published in Vikram Samvat 1939 i.e. 1882 A.D.. According to him it was written during the reign of Emperor Akbar. The text of "Allopanishad" as published on pages 556-67 of 'Satyarthaprakash' in "Dayanand-Granthmala published by Srimati Paropakarini Sabha, Ajmer 1983 Edn. reads as follows:

अथाल्लोपनिषद् व्याख्यास्यामः ।

अस्माल्लां इल्ले मित्रावरुणा दिव्यानि भक्ते ।

इल्लल्ले वरुणो राजा पुनर्हदुः ।

हया मित्रो इल्लां इल्लल्ले इल्लां वरुणो मित्रस्तेजस्कामः ॥१॥

होतारमिन्द्रो होतारमिन्द्र महासुरिन्द्राः ।

अल्लो ज्येष्ठं श्रेष्ठं परमं पूर्णं ब्राह्मणं अल्लाम् ॥२॥

अल्लोरसूलमहामदकबरस्य अल्लो अल्लाम् ॥३॥

आदल्लाबूकमेलकम् । अल्लाबूक निखातकम् ॥४॥

अल्लो यज्ञेन हुतहुत्वा । अल्ला सूर्यचन्द्रसर्वनक्षत्राः ॥५॥

अल्ला ऋषीणां सर्वदिव्यां इन्द्राय पूर्वं माया परममन्तरिक्षाः ॥६॥

अल्लः पृथिव्या अन्तरिक्षं विश्वरूपम् ॥७॥

इल्लां कबर इल्लां कबर इल्लां इल्लल्लेति इल्लल्लाः ॥८॥

ओम् अल्लाइल्लल्ला अनादिस्वरूपाय अथर्वणाश्यामा हुं ह्रीं जनानपशूनसिद्धान् जलचरान् अदृष्टं कुरु कुरु फट् ॥९॥

असुरसंहारिणी हुं ह्रीं अल्लोरसूलमहमदकबरस्य अल्लो अल्लाम् इल्लल्लेति इल्लल्लाः ॥१०॥

इत्यल्लोपनिषत् समाप्ता ॥

9. A. Fuhrer was the first archaeologist who read and translated and got published three inscriptions alleged to be fixed on Babari Masjid which was alleged to be built under command of Emperor Babur at the site of Sri Ramjanasthan. A. Fuhrer's book "The Sharqi Architecture of Jaunpur, with notes on Zafarabade, Sahet-Mahet and other Places in the North-Western Provinces and Oudh" containing those three Inscriptions was first published by the Archeological Survey of India in 1989.

A. Fuhere's translations and introductory notes thereto read as follows:

"Babar's- Masjid at Ayodhya was built in A.H. 930, or A. D. 1523, by Mir Khan, on the very spot where the old temple Janamasthanam of Ramchandra was standing . The following inscriptions are of interest.

Insscription No.XL written in Arabic character over the mihrab of the masjid it gives twice the Kalimah:-

" There is no God but' Allah, Muhammad is His Prophet"

Inscription no.XLI is written in Persian poetry, the meter being Ramal, in six lines on the member, right-hand side of the masjid.

"1.By order of *Babar*, the king of the world,

2. This firmament-like, lofty,

3. Strong building was erected.

4. By the auspicious noble *Mir Khan*.

5. May ever remain such a foundation,

6. And such a king of the world."

Inscription No.XLII is written in Persian poetry ,the metre being Ramal, in ten lines, above the entrance door of the masjid. A few characters of the second and whole third lines are completely defaced.

"1. In the name of God, the merciful, the clement.

2. In the name of him who...; may God perpetually keep him in the world.

3.

4. Such a sovereign who is famous in the world, and in person of delight for the world.

5. In his presence one of the grandees who is another king of Turkey and China.

6. Laid this religious foundation in the auspicious Hijra 930.

7. O God ! May always remain the crown, throne and life with the king.

8. May Babar always pour the flowers of happiness; may remain successful.

9. His counselor and minister who is the founder of this fort masjid.

10. This poetry, giving the date and eulogy, was written by the lazy writer and poor servant Fath-allah- Ghorī, composer."

The old temple of Ramachandra at Janamasthan must have been a very fine one, for many of its columns have been used by the Musalmans in the construction of Babar's masjid. These are of strong, close-grained, dark- coloured or black stone, called by the natives *Kasauti*, "touch-stone slate," and carved with different devices. They are from seven to eight feet long, square at the base, centre and capital, and round or octagonal intermediately.

(The Sharqi Architecture of Jaunpur by A. Fuherer Ph.D. p 67-68)

10. Annette Susannah Beveridge was the second british scholar who in 1921 published texts of two Inscriptions purported to be of alleged baburi Mosque which were supplied by the Deputy-Commissioner of Fyzabad alongwith English Translation and Transliteration thereof done by a Muslim. Said Inscriptions are Appendix "U" of Babur-Nama (Memoires of Babur) translated by her. In her said book A.S. Beveridge before giving Text and Translation of the alleged two Inscriptions writes as follows:

" Thanks to the kind response made by the Deputy-Commissioner of Fyzabad to my husband's enquiry about two inscriptions mentioned by several Gazetteers as still existing on 'Babur's Mosque' in Oudh, I am able to quote copies of both."

After giving text and transliteration of an Inscription he gives Translation with her exaggerating value thereof as follows:

"The translation and explanation of the above, manifestly made by a Musalman and as such having special value, are as follows:-"

"The inscription inside the Mosque is as follows:-"

After giving its Text and Transliteration she translates the alleged First Inscription as follows:

"1. By the command of the Emperor Babur whose justice is an edifice reaching up to very height of the heavens,

2. The good-hearted Mir Baqi built this alighting-place of angels;

3. Bavad khair baqi ! (May this goodness last for ever!)

The year of building it was made clear likewise when I said Buvad khair baqi (=935)."

"The inscription outside the Mosque is as follows:-"

After giving its Text and Transliteration she translates the alleged Second Inscription as follows:

"The explanation of the above is as follows:-"

"In the first couplet the poet praises God, in the second Muhammad, in the third Babur - there is a peculiar literary beauty in the use of the word *la-makani* in the 1st couplet. The author hints that the mosque is meant to be the abode of God, although he has no fixed abiding-place. - In the first hemistich of the 3rd couplet the poet gives Babur the appellation of qalandar, which means a perfect devotee, indifferent to all worldly pleasures. In the second hemistich he gives as the reason

for his being so, that Babur became and was known all the world over as a qalandar, because having become Emperor of India and having thus reach the summit of worldly success, he had nothing to wish for on this earth.

The inscription is incomplete and the above is the plain interpretation which can be given to the couplets that are to hand. Attempts may be made to read further meaning into them but the language would not warrant it."

(Babur-Nama Appendices U Page lxxvii -lxxix)

11. The Texts and Translations of the alleged inscriptions supplied to and published by S.A. Beveridge in 1921 are quite different from that the Texts and Translations of the alleged three inscriptions supplied to and translated by A. Fuhrer and published in 1889 by the Archaeological survey of India. Her statement that those Inscriptions were ' still existing on 'Babur's Mosque" is not trust worthy as it appears from her own admission that those inscriptions were supplied to her husband by the Deputy-Commissioner of Fyzabad and he had no occasion to see and examine the existence of the real Inscriptions.
12. In Waqf Commissioner's report dated Feb. 8 1941, it has been recorded that the Emperor Babur built the alleged Babri Mosque and appointed one Abdul Baqi its Mutawalli. No Papers related to grants in respect of alleged mosque were available. In this report one abdul Baqi has been stated to be Mutwalli of the Janam Asthan Mosque at Ajudhya built by Emperor Babur. If inscriptions would have been there then he would have mentioned the same and in that event he would have mentioned the name of either Mir Khan or Mir (and) Khan Baqi or Mir Baqi instead of Abdul Baqi. A copy of the said report is on pages 44 to 48 of the Vol.6 of the documents filed in the instant Suit by the plaintiffs: Relevant extract from the said report reads as follows:

"It appears that in 935 A.H. Emperor Babar built this mosque and appointed Syed Abdul Baqi as the mutwalli and khatib of the Mosque (vide clause 2 statement filed by Syed Mohammad Zaqi to whom a notice was issued under the the wakf Act.) An annual grant of Rs. 60/- was allowed by the Emperor for maintenance of the mosque and the family of the first mutwalli Abdul Baqi. This grant was continued till of the fall of the Moghal Kingdom at Delhi and the ascendancy of the Nawabs of Oudh.

According to Cl. 3 of the written statement of Mohammad Zaki Nawab Sa'adat Ali Khan, King of Oudh increased the annual grant to Rs. 302/ 3/6. No original papers about this grant by the king of Oudh are available."

(Ibid p.45)

13. Ld. Civil Judge Faizabad, Mr. A. Akhtar Ahasan caused Judicial Inspection of the Disputed Structure on 26th March 1946 in R. Suit No. 29 of 1945 Shia Central Board of Waqf U. P. Vs. Sunni Central Board of Waqf U.P. Said 'Inspection Note' of the Ld. Judge as well as Persian Text of Two Inscriptions alleged to be found on Disputed Structure are on pages 355 to 360 of the

Volume 12 of the Documents i.e. Volume III of the Plaintiffs' documents filed in O.S. No. 4 of 1989. 1st Inscription is on page 356 while 2nd Inscription is on page 357. Notes are on pages 355 & 357.

Inspection Notes read as follows:

"Inspection Notes

26-3-46

Present:- Mesud. Musanna & Khoja M. Yaqub, counsel for parties (besides others).

Inspected the mosque in suit and found the following inscriptions on a stone tablet near the pulpit.-

P.T.O.

.....(Persian Txt).....

According to both parties this-Kotba was replaced a new in place of the original tablet which was demolished during the communal riots in 1934. There is another tablet at the central arch of the mosque facing the court-yard & it contains the following couplets:-

.....(Persian Text).....

Note:- The above inscription was read by Sheikh Karamatullah (D. W. 5) who climbed up the arch by means of a ladder & he read verses and written in Arabic character.

Sd. A. Akhtar Ahasan

26.3.46.

14. In his judgment and Order dated 30-02-1946 passed in R. Suit No. 29 of 1945 Shia Central Board of Waqf U. P. Vs. Sunni Central Board of Waqf U.P., the Ld. Civil Judge Faizabad, has incorporated translation of the inscription NO. 1 in its entirety and, gist of the inscription NO.2. (Relevant portion of the said judgment containing translation of the inscription No.1 and gist of the inscription NO.2 extracted from page 113 of the Documents' Volume 10 being volume I of the Documents of the plaintiffs in O.O.S. No. 4 of 1989 reads as follows:

Lastly there are the two Inscription in the mosque which have been reproduced in my inspection notes. These are also referred to in the Gazettes and according to the date in the inscription on the pulpit it was built in 923 Hijri, while according to other it was in 935 H. corresponding with 1528 A.D. These inscriptions were the sheet-anchor of the plff's case but I am of the opinion that they are inconclusive. The 1st inscription contains three couplets in Persian and when translated runs as follows:

"By the order of Shah Babar, whose justice went up to the skies (i.e. was well known), Amir (Noble) Mir Baqi, of lofty grandeur, built this resting place of angels in 923 Hijri."

The 2nd inscription is more elaborate and contains usual high flown language on eulogy of Babar & describe Mir Baqi of Isphahan as his adviser and the builder of the mosque. This inscription no doubt

supports the plff's case, because it does not say that it was by the order of Babar shah & it only refers to the reign of Babar but the 1st couplet in the 1st inscription near the pulpit, clearly supports the theory that Babar had ordered the building of the as stated in the Gazettes and the settlement report.'

15. From the above mentioned Notes and Judgment of the Ld. Civil Judge Faizabad it becomes crystal clear that the Inscriptions were destroyed in communal riot in 1934 and were subsequently restored by the contractor Tehwoor khan. Alleged two inscriptions records two different dates of erection of the building. In one it is given 923 Hijri corresponding to 1516-17 A.D. while in other Inscription it has been given 935 A.D. corresponding to 1528-29 A.D. In this Inscription Mir Baqi of Isphahan has been described as Babur's adviser and the builder of the mosque. As Esfahan and Taskend are part of two different Nations i.e. Iran and Uzbekistan respectively these two Baqi are to be construed two different persons. While in A. Fuhere's Inscription structure in question has been mentioned as lofty firmament building ; in the contractor Tehwoor khan's restored Inscription it has been purposely mentioned as resting place of angels.

16. In 1964-65 Dr. Z.A. Desai, Superintendent, Persian and Arabic Inscription Nagpur published Texts and Translations of three Inscriptions alleged to be fixed on Babari Mosque. Dr. Desai gives reason for his said publication of the Texts and Translations of the said Inscriptions as follows:

" The mosque contains a number of inscriptions. On the eastern façade is a *chhajja*, below which appears a Quaranic text and above, an inscription in Persian verse. On the central *mihrab* are carved religions texts such as *Kalima* (first Creed), etc. On the southern face of the pulpit was previously fixed a stone slab bearing a Persian inscription in verse. There was also another inscription in Persian verse built up into the right hand sidewall of the pulpit. Of these, the last mentioned two epigraphs have disappeared. They were reportedly destroyed in the communal vandalism in 1934 A.D., but luckily, I managed to secure an inked rubbing of one of them from Sayyid Badru'l-Hasan of Fyzabad. The present inscription, restored by the Muslim community, is not only in inlaid *Nasta'liq* characters, but is also slightly different from the original, owing perhaps to the incompetence of the restorers in deciphering it properly.¹

The readings and translations of the historical epigraphs mentioned above, except in the case of one, were published by Fuhrer and Mrs. Beveridge, but their readings are so incomplete and different from the text that their inclusion in this article is not only desirable but imperative.

The epigraph studied below was built up into the southern side of the pulpit of the mosque, but is now lost, as stated above It is edited here from the estampage obtained from Sayyid Badru'l-Hasan of Fyzabad⁴. Its three-line text consists of six verses in Persian, inscribed in ordinary *Naskh* characters within floral borders."

Dr. Desai's footnotes 1 & 4 reads as follows:

"¹Below the restored epigraph is inscribed in four lines the following Urdu record concerning the fate of the original inscription-

original inscription :-

۲۷ مارچ سنہ ۱۹۳۴ ع مطابق ۱۱ ذی الحجہ سنہ ۱۳۵۲ ہ بروز بلوہ ہاتھ بلوائی مسجد
 شہید کر کے اصل کتبہ الہا لے گئے جسکو تہوور خان ٹھیکہدار نے نہایت خوبی کے ساتھ
 تعمیر کیا ۔

Free English translation of the above Urdu record reads as follows:-

"On 27th March, 1934 the Hindus - after having made the masjid shahid took away the original inscription which was dexterously rebuilt by the contractor Tehwoor khan."

"⁴ It may be argued that since the epigraph is not quoted in Fuhrer's SAJ, the slab had already disappeared before he wrote. But that is not the case, since the tablet was found therein 1906-07 A.D. by Maulavi M Shua'ib of the office of the Archaeological Surveyor Northern Circle, Agra (Annual Progress Report of the Office of the Archaeological Surveyor, Northern Circle Agra, for 1906-07; Appendix. D)"

(Ibid.p.59)

Infact Dr. Desai's this statement purported to prove his hollow claim is also wrong as no such Appendix as mentioned is available. For the sake of argument only if for a moment it is assumed that in 1906-07 Maulavi M Shua'ib had appended such Inscription even then it does not prove that it was in existence in 1889 when Fuhrer published Inscriptions otherwise it would have been necessarily transmitted to A. Fuherer.

Dr. Z.A. Desai's Translation of the first inscription being Plate XVII (a) reads as follows:-

1. By the order of king Babur whose justice is an edifice, meeting the place of the sky (i.e. as high as the sky),
2. This descending place of the angels was built by the fortunate noble Mir Baqi.
3. It will remain an everlasting bounty, and (hence) the date of its erection became manifest from my words: *It will remain an everlasting bounty.*"

(Ibid.p.59)

Dr. Desai deciphering the numerical value and hidden meanings of the chronogram of the First Inscription writes as follows:

"The numerical value of the chronogrammatic contained in the second hemistich of the last line adds up to give the year A.H. 935 (1528-29 A.D.) There is also a play in the word Baqi in the above phrase: Baqi means everlasting and it is also the name of the noble-man-builder is

both the meanings are equally applicable here. The phrase can be translated also as: It is a bounty of Baqi.”

(Ibid.p.59-60)

Dr. Z.A. Desai's before publishing Text and Translation of the second inscription being Plate XVII (b) informs about its non-existence as follows:-

“The second inscription on the mosque also in Persian verse, consisted of three couplets arranged in six lines. The epigraphic tablet, which was built up into the right-hand side wall of the pulpit, does not exist now and therefore, the text of the inscription is quoted from Fuhrer's work.”

(Ibid.p.60)

Dr. Z.A. Desai's Translation of the second inscription being Plate XVII (b) reads as follows:-

- “1. In accordance with the wishes of the ruler of the world, Babur,
2. A lofty building like the palace of the spheres,
3. (that is to say) this lasting house (*of God*), was founded
4. By the fortunate noble Mir (*and*) Khan (*Baqi*).
5. May ever remain such a founder of its edifice,
6. (*and*) such a king of the world and age!”

(Ibid.p.60)

Dr. Z.A. Desai's before publishing Text and Translation of the third inscription being Plate XVII (c) says that Fuhrer must have been mis- informed about the same which means in fact A. Fuherer had not seen the third inscription himself but had relied on other's wrong information. His said statements read as follows:-

“ The third record of Babur in the Ajodhya masque, comprising a fragment of eight Persian verses of mediocre quality and a colophon appears over the central entrance to the prayer- chamber above the chhajja. The four line text is executed in fairly good *Naksh* characters in relief amidst floral borders, on a slab measuring about 2m.by 55 cm. The text is fairly well preserved, and Fuhrer must have been misinformed to affirm that ‘a few characters of the second and the whole third lines are completely defaced.’ “

(Ibid.p.60)

Dr. Z.A. Desai's Translation of the third inscription being Plate XVII (c) reads as follows:-

- “1. In the name of Allah, the Beneficent, the Merciful. And in Him is trust.

2. In the name of One who is Wise, Great (and) Creator of all the universe (and) is spaceless. After His praise, blessings be upon the Chosen one (i.e. the Prophet), who is the head of prophets and best in the world. The *qalandar*-like (i.e. truthful) Babur has become celebrated (lit. a story) in the world, since (in his time) the world has achieved prosperity.

3. (He is) such (an emperor) as has embraced (i.e. conquered) all the seven climes of the world in the manner of the sky. In his court, there was a magnificent noble, named Mir Baqi the second Asaf, Councilor of his government and administrator of his kingdom, who is the founder of this mosque and fort-wall.

4. O God, may he live for ever in this world, with fortune and life and crown and throne! The Time of the building is this auspicious date, of which the indication is nine hundred (and) thirty five (A.H. 935=1528-29 A.D.).

Completed was this praise of God, of Prophet and king. May Allah illumine his proof! Written by the weak writer and humble creature, Fathu'llah Muhammad Ghorî."

(Ibid.p.60-61)

17. Dr. Z.A. Desai informs that Fuhrer's reading does not appear to be free from mistakes. But he does not specify the mistakes committed by Fuhrer in his reading of the texts and translations thereof. From the scrutiny of Dr Desai's translation it appears that Dr. Desai in 4th line has added "*and*" between '*Mir*' and '*Khan*' and "*Baqi*" after '*Khan*'. So he has converted '*Mir Khan*' into '*Mir Khan Baqi*'. And in the 3rd line he has added "*of God*" after '*this lasting house*' to make it a mosque. He has neither given any rational explanation for his said conversion of '*Mir Khan*' into '*Mir Baqi*' nor He has exhibited as to how the Fuhrer's translation is different from the original text.
18. Dr. Z.A. Desai In his detailed discussion on all inscriptions of Babur's regime writes an introduction that a rough draft of an article of his predecessor Maulavi M. Asuraf Hussain who retired in 1953 was found amongst sundry papers in his office with a note that it might be published after revision by his successor. Consequently, he claims, that he has published these inscriptions with translation after extensive revision and editing, but nowhere has he mentioned that which portions of the reading of these inscriptions are his own revision and editing and on what ground these revisions have been made. About inscriptions at Ayodhya he writes that there are three inscriptions in the Babari Mosque out of which the two were completely destroyed by the Hindu rioters in 1934 A.D. However, he managed to secure an ink-stampage of one of them from Sayyid Badru'l - Hasan of Fyzabad. He writes that the present inscription restored by the Muslims Community, "is also slightly different from the original owing perhaps to the incompetence of restorers in deciphering it properly." When Dr. Desai himself admits that the restored inscription is slightly different from the original, then his claim that the restored inscription fixed on Baburi mosque in or after 1934 is the dextrously rebuilt of the original one alleged to be fixed on since the days of Babur becomes meaningless and un-trustworthy. . In fact, none of the Inscriptions was fixed on the Disputed

Structure which has all along been sacred place of the Hindus known as Sri Ramajanmasthan Temple.

19. Dr. Desai informs that he has based his translation on the inscription of Fuhrer, although he says that Fuhrer must have been misinformed to affirm that; "few corrections of the second and the whole third line completely defaced". Even if it is supposed that some words in the 2nd line and the whole third line are defaced, there is not much impact in the meaning of the text of the inscription. But here we do find that Dr. Desai has extensively changed the meaning of the translated passage. It is quite different from what Fuhrer had translated. Fuhrer had written that it is in ten lines, above the entrance door of the Masjid. He has made its translation in ten separate lines. Dr. Desai has considerably changed the meaning of the text without pinpointing how Fuhrer's translation was wrong. Since beginning and the end of the text are the same and the inscription is said to be the same and there is no major variance in Fuhrer's English translation from the Persian text, Dr. Desai's translation appears to be arbitrary. He has changed the date of the inscription 930 H. (1523 A.D.) to 935A.H. without assigning any reason. In Dr. Desai's translation the name of Mir Baqi the second Asfaq appears where as in the original Persian text Mir Baqi's name does not appear at all. Then Babar is called a *Qalandar* in this inscription which is not found in Fuhrer's translation. After 4th line Dr. Desai does not follow the line system and at the end he mentions Fathu'llah Muhammad Ghorī as the humble writer of this inscription. His name figures in the Fuhrer's translation too. He goes on expanding how Babar was called *Qalandar* but he does not explain how the changes have taken place in the inscription which was not in the text read by Fuhrer.
20. In the above mentioned Inscriptions the Emperor's name Zahiru'd-Din Muhammad Babur Badshah Ghazi which has been recorded almost in all other available Inscription of his period, is missing from which it appears that the forgers of later days were not familiar with the correct name of the said Emperor.

In the Inscription, dated A.H. 933 i.e. 1526-27 A.D. found on the wall of a well from Fatehpur Sikri being Plate No. XV(a) in its 1st line his name has been recorded as follows:

"Zahiru'd-Din Muhammad Babur Badshah Ghazi"

(Epigraphia Indica Arabic & Persian
Supplement 1964 and 1965 at page-51)

In the Inscription of A.H. 934 i.e. 1527-28 A.D. found on a mosque from Panipat being Plate No. XVI(b) in its 1st line his name has been recorded as follows:

"Zahiru'd-Din Muhammad Babur Badshah Ghazi"

(Ibid.p. 55)

In the Inscription dated A.H. 934 i.e. 1527-28 A.D. found on a mosque from Rohatak being Plate No. XVI(a) in its 2nd line his name has been recorded as follows:

“Zahiru’d-Din Muhammad Babur Badshah Ghazi”

(Ibid.p. 56-7)

In the Inscription dated A.H. 934 i.e. 1528 A.D. found on a mosque from Rohtak being Plate No. XVII(a) in its 1st line his name has been recorded as follows:

“His Majesty Babur Badshah Ghazi”

(Ibid.p. 57)

In the Inscription of A.H. 935 i.e. 1528-29 A.D. found on a mosque from Palam(Delhi) being Plate No. XVIII(a) in its 1st and 2nd lines his name has been recorded as follows:

“Zahiru’d-Din Muhammad Babur Badshah Ghazi”

(Ibid.p. 62)

In the Inscription of A.H. 935 i.e. 1528-29 A.D. found on a mosque from Pilakhna being Plate No. XVIII(c) in its 3rd line his name has been recorded as follows:

“Zahiru’d-Din Muhammad Babur Ghazi”

(Ibid.p. 64)

In the Inscription dated A.H. 936 i.e. 1529 A.D. found on a mosque from Maham being Plate No. XIX(a) in its 1st and 2nd lines his name has been recorded as follows:

“Zahiru’d-Din Muhammad Badshah Ghazi”

(Ibid.p. 65)

21. It is not uncommon for ruffians to fix old Inscriptions on newly built and / or converted mosques. ‘Epigraphia Indica Arabic & Persian Supplement 1964 and 1965’ at its pages 55 and 56 records that two Inscriptions dated 1934 fixed on two mosques at Rohtak did not belong to those mosques but have been fixed thereon. relevant extracts from said book read as follows:

“Among the historical buildings, two mosques, viz., Masjid-i-Khurd in the Fort² and Rajputon-ki-Masjid, a new mosque in the city area, bear inscriptions of the time of Babar. The one on the Masjid-i-Khurd consists of three lines inscribed on a tablet measuring 53 by 23cm. Which is fixed over the central archway outside³. The slab is badly damaged and considerable portion of the text has peeled off. It is, therefore, not possible to decipher it completely, but this much is certain that it refers to the construction of a mosque in the reign of ahiru’d-Din Muhammad Babur by one Qadi Hammad. If the Tughluq inscription occurring on the outer archway is *in situ*, this epigraph may not belong to this mosque.”

(Ibid.p.56)

“The other epigraph of Babur in Rohtak is from the Rajputon-ki-Masjid. Fixed over its central arch, the tablet, measuring 1.1 m. By 21 cm.,

does not belong to the mosque, but it was rather intended as the tombstone of Masnad-i-'Ali Firuz Khan. It is inscribed with two lines of Persian which are slightly affected by the weathering of the stone. The text records A.H. 934 (1528 A.D.) as the date of the construction of the tomb of Masnad-i-Ali Firuz Khan, son of Masnad-i-Ali Ahmed Khan and grandson of Masnad-i-Ali Jamal Khan and refers itself to the reign of Babur. The style of writing is ordinary Naskh. I have read it as follows:-

TEXT

Plate XVII(a)

TRANSLATION

(1) Completed was in the reign of His Majesty Babur Badshah Ghazi, may Allah perpetuate his kingdom and sovereignty, this noble edifice, (viz.) the tomb of His Excellency Masnad-i-Ali³ Firuz Khan, son of Masnad-i-Ali Ahmad Khan, son of Masnad-i-Ali Jamal Khan, the deceased, all of them, on the 10th of the month of Rabiul-Akhar, year (A.H.) four and thirty and nine hundred (10th Rabi'II A.H. 934 = 3rd January 1528 A.D.).

(Ibid. P. 57)

22. In *Epigraphia Indica Arabic & Persian Supplement 1964 and 1965* at its pages 19 and 20 S.A. Rahim reports that at Fathabad near Chanderi in Guna district of Madhya Pradesh, stands the partially ruined palace known as Kushk-Mahal and Inscription fixed thereon are not dated back to its construction but have been affixed thereon from time to time either by the visitors or by the Governors thereof. Relevant extracts from his said report read as follows:

“ It would not be, however, wholly correct to say that the Kushk-Mahal does not bear any inscription. There are about a score of places on the walls enclosing the stair-cases, referred to above, which bear short inscriptions. The rubbings of some of these were found in the bundles of old estampages which were transferred to our office, from the Office of the Government Epigraphist for India, Ootacamund, South India, who in his turn seems to have received them quite some time back from the Archaeological Department of the erstwhile Gwalior state. I prepared fresh rubbings of these records when I toured some places in Madhya Pradesh, including Chanderi, in November 1962. Of these, some are mere repetitions of the same text and as such have been excluded from this purview. The remaining four inscriptions are edited here for the first time.

These inscriptions raise an important question, as to whether they are contemporary with the building or not. They do not appear to be so, because they are not inscribed on tablets set up on the walls, nor are they found incised on prominent places on the monument. A building of such magnificence would have had, if at all it was so planned, an inscription of proportionate prominence. This does not rule out the

possibility, however, of the existence of an epigraph on the monument, for it is possible that it had one and may have disappeared since. Moreover, the texts of the inscriptions under study are also vague on this point, for they do not make any explicit reference to the palace-building or its construction. In view of these facts, it appears more likely that these records are either visitors' etchings or some sort of mementos which the governors, the palace-guards or some other officials might have desired to leave on the stone.

Fortunately, one of these four records is dated, and since the same penmanship is employed in the other three records, they can also be safely taken as having been inscribed at about the same time or at short intervals. Their language is Persian and style of writing cursive *Naskh*. The wear and tear of time has affected the stone, resulting into partial obliteration of some of the letters, particularly in the first inscription.

The contents of these four epigraphs classify them into two groups: one, of the first inscription, and the other of the remaining three. The first refers itself to the governorship(amal) of Khan-i-A'zam Sharaf Khan Sultani and the superintendence (*shahnagi*) of one person whose name is not very legible; it seems to be Raja, (son of) Shams, (son of) Fath. The name of the writer which is also not clear, appears to be Shiv Sing(?) Gulhar. This inscription is dated 1489-90.

The three records of the other group refer, between themselves, to the governorship of Malik Mallu Sultani and superintendence of Sarkhail Shariqi Mulki and quote Gulhar Jit(?) Dev, as the scribe. They are undated and hence, it is difficult to state positively if they are earlier than the above dated inscription or not."

(Ibid. P.19-20)

PART – VI

AUTHENTIC HISTORICAL BOOKS, MEMOIRS OF MUGHAL KINGS, PRINCESS, THEIR COMMANDER, GAZETTEERS & TRAVELLERS' ACCOUNT DID NOT PROOVE OF ERECTION OF ALLEGED BABARI MOSQUE BUT PROVE EXISTENCE SRI RAMJANMSTHAN & TEMPLE THEREON:

1. From the Babur-Nama, Humayun-Nama, Tuzuk-I-Jahangiri, Tarikh-I Badauni also known as Muntakhap-ut-Tawarikh, Tarikh-I Feristha, A-In-I Akbari, Tabkat-I Akbari, Waqiyat-I Mushtaqi, Tarikh-I Daudi, Tarikh-I Shahi, Tarikh-I Salatin-I Afaghana, India in the 17th Century (Memoirs of Francois Martin), History of Indian and Eastern Architectures, Mughal Documents etc.; one comes to know the fact that the Emperor Babur did not build any Mosque in Ayodhya as there is no mentioning of any such Mosque till the reign of his great great grandson Emperor Shah Jahan. In 1770 when a Jesuit Priest Father Tieffenthaler visited he found Hindus worshiping inside Sri Ramjanamsthan temple. He has written that according to tradition Sri Ramjanamsthan temple described as Babri Mosque in the plaint of the instant suit was converted into a mosque by Emperor Aurangzeb. But apart from scriptures Yuan Chwang's travel account, A-In-I Akbari, Travel account of William Finch, Storia Do Mogor, Del' Inde of Father Josheph Tieffenthaler, The East India Gazetteer, 1828, The Gazetteer of the Territories under the Government of East India Company and of the native States on the continent of India, 1858, the Gazetteer of the Province of Oudh, 1877-78, The Gazetteer of Faizabad, 1960 as well as from the several applications made from time to time by the alleged Mutwallis, Muezzins, Khattibs etc. the Hindus are found worshipping at the said Sri Ramjanamsthan temple upto date.
2. The Chinese Traveler *Yuan Chwang* who Travelled India in the reign of Emperor Harshavardhan during the period of 629 A.D.to 645 A.D. has recorded existence of Ten prominent Deva Temple of the Hindus in Ayodhya which shows that the prominent Temples described in *Sri Skandapuranam* including the Sri Ramjanamsthan Temple were still in existence during the Ayodhya visit of Yuan Chwang. Relevant extract from page 355 of the book *On Yuan Chwang's Travels in India (A.D.629 – 645* translated by Thomas Watters reads as follows:

“The Ayudha country, the Records proceeds to tell us, was above 5,000 *li* in circuit, and the capital was above twenty *li* in circuit. The country yielded good crops, was luxuriant in fruit and flower, and had a genial climate. The people had agreeable ways, were fond of good works, and devoted to practical learning. There were above 100 Buddhist monasteries, and more than 8000 Brethren who were students of both ‘vehicles’. There were ten *Deva-Temples* and the non-Buddhists were few in number.”

(On *Yuan Chwang's Travels in India (A.D.629 – 645* translated by Thomas Watters p.355).
3. In his memoirs Babur-Nama Babar did not record any entry to show that there was fighting between him and the then Ruller of Ayodhya or to show under his order any mosque was erected in Ayodhya as such the plaint case that

there was fighting between Babur and the then ruler of Ayodhya wherein several soldiers of Babur were killed and for corpse of those soldiers said Emperor made grave-yards and for other Muslims made a mosque has no foundation at all. In his memoirs Babur has mentioned name of the places and nature of constructions carried on at such places but he has not mentioned Ayodhya and Babri mosque. In 935 A.H. itself Babur remembered that construction works were going on in Dhulpur and Agra but did not mention construction of Baburi Mosque at Ayodhya. He has recorded his orders given for constructing wells, building, mosque, ponds etc. very minutely and he has referred construction of one place several times in his Memoirs as such there is no possibility of his missing any construction at Agra. Relevant extracts from pages 520, 606-607, 615-616 and 642 from the Babar-Nama translated by Annette Susannah Beveridge reprint of 2006 published by the Low Price Publications, Delhi read as follows:

“680 men worked daily on my buildings in Agra and of Agra stone-cutters only; while 1491 stone-cutters worked daily on my buildings in Agra, Sikri. Biana, Dulpur, Gualiar and Kuil. In the same way there are numberless artisans and workmen of every sort in Hindustan.” (ibid p. 520)

Babur-Nama's entry dated 21st September 1528 (935 A.H.) records his order to erect a mosque in Dhulpur, said entry reads as follows:

“(c. Work in Dulpur (Dhulpur).)

That place is at the end of a beaked hill, its beak being of solid red building-stone (imar-at-task). I had ordered the (beak of the) hill cut down (dressed down?) to the ground-level and that if there remained a suffering height, a house was to be cut out in it, if not, it was to be levelled and a tank (hauz) cut out in its top. As it was not found high enough for a house, Ustad Shah Muhammad the stone-cutter was ordered to level it and cut out an octagonal, roofed tank. North of this tank the ground is thick with trees, mangoes, jaman (*Eugenia jambolana*), all sorts of trees; amongst them I had ordered a well made to by to; it was almost ready; its water goes to the afore-named tank. To the north of this tank Sl. Sikandar's dam is flung across (the valley); on it houses have been built, and above it the waters of the Rains gather into a great lake. On the east of this lake is a garden; I ordered a seat and four-pillared platform (talar) to be cut out in the solid rock on that same side, and a mosque built on the western one.” (ibid p.606-607)

Babur-Nama's entry dated 14th October, 1528 records inspection of the work at Sikari as follows:

“At the top of the dawn, we bestirred ourselves from that place, and in the first that place, and in the first watch dismounted at the garden now in making at Sikri. The garde-wall and well-buildings were not getting on to my satisfaction; the overseers therefore were threatened and punished.” (ibid p. 615-616)

Babur-nama's entry dated 1st February, 1929 records the appointment of the supervisors for the work which was being carried on at Agra and Dhulpur as follows:

"(Feb. 1st) On Tuesday, after writing letters to be taken by those going to Kabul, the buildings in hand at Agra and Dhulpur were recalled to mind, and entrusted to the charge of Mulla Qasim, Ustad Shah Muhammad the stone-cutter, Mirak, Mir Ghias, Mir Sang-tarash (stone-cutter) and Shah Baba the spadesman. Their leave was then given them." (ibid p. 642)

4. Princes Gul-Badan Begam, the daughter of the Emperor Babur in her book Humayun-Nama has mentioned several constructions at different places wherein Ayodhya and Baburi Mosque did not find place. From which facts it becomes clear that no construction of Baburi Mosque was done by the Emperor Babur in Ayodhya was made by Relevant extract from her said book read as follows:

"He commanded buildings to be put up in Agra on the other side of the river, and a stone palace to be built for himself between the haram and the garden. He also had one built in the audience court, with a reservoir in the middle and four chambers in the four towers. On the river's bank he had a chaukandi built.

He ordered a tank made in Dhulpur, ten by ten, out of a single mass of rock, and used to say, 'when it is finished, I will fit it with wine.' But as he had given up wine before the fight with Rana Sanga, he filled it with lemonade." (ibid p.98)

"When we had been in Agra three months, the Emperor went to Dhulpur. Her Highness Maham Begam and this lowly person also went. A tank had been made there, ten (gaz) by ten, out of one piece (of rock). From Dhulpur his Majesty went on to Sikri. He ordered a great platform made in the middle of the tank, and when it was ready, he used to go and sit on it, or to row about. This platform still exists."

(ibid p. 102)

From Gulbadan-Begam's account related to the event which took place just after death of Emperor Babur it appears that Mir Baqi was not Governor of Oudh but some one else. Relevant extract from her book read as follows:

"As Gul-chihra Begam was in Oude, and her husband, Tukhta-bugha Sultan, went to the mercy of God, her attendants wrote to his Majesty from Oude and said: 'Tukhta-bugha Sultan is dead. What is the order about the begam?' His Majesty said to Mir Zaycha: 'Go and bring the begam to Agra. We also are going there'." (ibid p.115)

5. In his book "History of Indian and Eastern Architecture" 1st published 1910 reprinted by Low Price Publication, Delhi in 2006 in its Chapter X 'Mughal Architecture' James Fergusson writes that no buildings erected by Babur or his son Humayan are existent. The writer also writes that the Babur in his memoirs had written that he had employed 680 persons on his palaces and 1491 stone cutters at Agra, Sikri, Biana, Dhulpur, Gwalior and Koil for construction work. From this recording it becomes clear that if Babur would have employed workers to erect lofty firmament building in Ayodhya somewhere

in four corners of his memoirs sooner or later certainly he would have mentioned. Relevant extract from the page 285 of "History of Indian and Eastern Architecture" read as follows:

"There is, again, a little difficulty and confusion in our having no examples of the style as practised by Babar and Humayun. The well-known tomb of the latter king was certainly built by his son Akbar; Babar was buried near Kabul, and no building known to be his has yet been identified in India. Yet that he did build is certain. In his own 'Memoirs' he tells us. "In agra alone, and of the stone-cutters belonging to that place only, I everyday employed on my palaces 680 persons; and Agra, Sikri, Biana, Dholpur, Gwalior and Koil, there were every day employed on my works 1,491 stone-cutters." In the following pages he describes some of these works, and especially a Baol of great magnificence he excavated in the fort of Agra. This was in the year 1526, and he lived to carry on these works for five years longer. During the ten years that his son retained the empire, we learn from Ferishta and other sources that he adorned his capital with many splendid edifices: one, a palace containing seven pavilions or audience halls – one dedicated to each of the planets, in which he gave audience on the day of the week dedicated to the planet of the day. There are traditions of mosque he is said to have built on the banks of the Jamna, opposite where the Taj now stands; and his name is so frequently mentioned in connection with buildings both at Agra and Delhi that there can be little doubt that he was a builder to as great an extent as the troubled character of his region would admit of. But his buildings have perished, so that practically the history of Mughal architecture commences with the buildings of an Afghan dynasty who occupied the throne of India for sixteen years during the last part of Humayun's lifetime."

(ibid p. 285)

6. Within 26th years of the death of Emperor Zahiruddin Muhammad Babar in the year 1556 his grandson Emperor Jalaluddin Muhammad succeeded his empire. During the reign of Akbar, the Great, *A-in-I Akbari*, the Gazetteer of his Kingdom was compiled by Emperor's close confidant and an erudite scholar Abul Fazl Allami. In the said Gazetteer Abul Fazl gives very minute and microscopic account of Ajodhya he records that Ajodhya is esteemed ones of the holiest places of antiquity and was the residence of Ramchandra in the *Treta* age. He further records that near the city there were two tombs of six and seven yards in length alleged to be of Seth and the Prophet Job. He also records the presence of the tomb of Kabir at Ratanpur as well as graves of the Salar Masud and Rajab Salar located in Bahraich; but he did not mention existence of Babri Mosque or any other Mosque in Ayodhya from which it is crystal clear that during the reign of Akbar, the Great there was existence of Sri Ramjanmasthan but there was no existence of Baburi Mosque otherwise a person from whose notice even the graves have not been escaped would have certainly described said Babari Mosque more so a Mosque built by the grandfather of his patron. Relevant extract from page 182 of the Volume-II of the said book reads as follows:

Awadh (Ajodhya) is one of the largest cities in India. It is situated in longitude 118° 6' and latitude 27°22'. In ancient times, its populations side covered an extent of 148 *kos* in length and 36 in breadth and it is esteemed ones of the holiest places of antiquity. Around environs of the city, they sift the earth and gold is obtained. It was the residence of Ramchandra who in the *Treta* age combined in his own person both the spiritual supremacy and the kingly office.

At the distance of one *kos* from the city, the Gogra, after its junction with the Sai, [Saraju] flows below the fort. Near the city stand two considerable tombs of six and seven yards in length respectively. The vulgar believe them to be the resting-places of Seth and the prophet Job, and extraordinary tales are related of them. Some say that at Ratanpur is the tomb of Kabir, the assertor of the unity of God. The portals of spiritual discernment were partly opened to him and he discarded the effete doctorines of his own time. Numerous verses in the Hindi language are still extant of him containing important theological truths. Bahraich is a large town on the banks of the river Sarju. Its environs are delightful with numerous gardens. Salar Masud and Rajab Salar are both buried here."

(*A-in-I Akbari* Vol-II p.182)

7. *A-in-I Akbari* describing Ten-incarnations of the Lord of Universe Sri Vishnu, records that Sri Rama was born in the city of Ayodhya on 9th day of bright half of Chaitra. Relevant extract from page 316-17 of Vol. III of the said book reads as follows:

"He was accordingly born during the *Treta* Yuga on the ninth of the light half of the month of *Chaitra* (March-April) in the city of Ayodhya. That *Kausalya* one of the wife of Raja *Dasaratha*. At the first dawn of intelligence, he acquired much learning and withdrawing from all worldly pursuits, set out journeying through wilds and gave a fresh beauty to his life by visiting holy shrines. He became lord of the earth and slew *Ravana*. He ruled for eleven thousand years and introduced just laws of administration.

(*A-in-I Akbari* Vol-III p.316-317)

8. *A-in-I Akbari* in its Chapter -IX enumerating sacred places of pilgrimage of the Hindus records that in Ajodhya on the birth day of the Lord of Universe Sri Rama a great religious festival was held in those days. Relevant extract from page 334 of Vol. III of the said book reads as follows:

"Ajodhya, commonly called 'Awadh' this distance of forty *kos* to the east, and twenty to the north is regarded as sacred ground. On the ninth of the light half of the month of *Chaitra* a great religious festival is held".

(*A-in-I Akbari* Vol-III p.334)

9. From the book *Tarikh-I Badauni* written by Abdul Kadir Badauni another court Historian of the Emperor Akbar it appears that said Emperor had very high regard for Sri Ram Chandra and at the instance of the Emperor, Abdul Kadir Badauni had translated *Ramayana*. Relevant extracts from his said

book as contained in "History of India As Told By Its Own Historians" Vol.III translated by Sir H.M.Elliot and reprinted in 2008 by Low Price Publications, Delhi reads as follows:

"Translation of the Ramayana.

[Text, Vol. ii. P. 336] [In this year the King commanded me to make a translation of the Ramayana, a composition superior to the Mahabharat. It contains 25,000 shloks, and each shlok is a verse of sixty-five letters. The hero of its story is Ram whom the Hindus worship as a god in human form.]

[Text, Vol.ii, p.366.] [In the month of Jumads- I awwal A.H. 999,] completed the translation of the ramayan, having occupied four years in the work. When I presented the book, it was greatly praised.]

(ibid p.539)

10. In his book "History Of The Rise Of The Mahomedan Power In India till the year A.D. 1612" Mahomed Kasim Ferishta enumerates the mosques which were rebuilt and repair by the Emperor Babur where in there is no mention of Babari Mosque from which fact it is clear that no Mosque in the name of Baburi was built by Babur. He also writes that Babur was Learned in the Doctrines of the sect of Huneef. Relevant extracts from the Vol.II of the said book translated by John Briggs and published by Low Price Publication, Delhi reads as follows:

"The empty fort thus fell into the hands of the Mgouls, and Babur did not fail to rebuild and repair those mosques in Chundery, Sarungpoor, Runtunbhore and Raisein, which had been partly destroyed and otherwise injured by being converted into cattlesheds, by Medny Ray's order. He also restored those countries to their legitimate sovereign. Sooltan Ahmud, the son of Sooltan Mahomed, and grandson of Sooltan Nasir-ood-Deen Khiljy, King of Malwa."

(ibid p.38)

"He was learned in the doctrines of the sect of Huneef, and never omitted his daily prayers."

(ibid p.41)

11. Abdul Kadir Badauni in his book has written that the Emperor Akbar had become very much sympathetic to Hindus. He had adopted sun worship and other mode of worship of the Hindus. He had handed over several Mosques to Hindus and had allowed Hindu converts to return back to their own religion. From the facts as stated by said critic historian of the Emperor's Court, it can be inferred that if any Mosque would have been erected over Sri Ramajanamsthan it would have been handed over to the Hindus and such transfer of Mosque would not have escaped notice of Badauni. The relevant extracts from the Badauni's said book reproduced in A-In-I Akbari Vol.I translated by H.Blochmann and reprinted in 1989 by the Low Price Publication, Delhi read as follows:

"Moreover, Sumanis and Brahmins managed to get frequent private interviews with His Majesty. As they surpass other learned men in their treatises on morals, and on physical and religious sciences, and

reach a high degree in their knowledge of the future, in spiritual power and human perfection, they brought proofs based on reason and testimony, for the truth of their own and the fallacies of other religions, and inculcated their doctrines so firmly and so skilfully represented things as quite self-evident which require consideration, that no man, by expressing his doubts, could now raise a doubt in His Majesty, even if mountains were to crumble to dust, or the heavens were to tear as under."

(*Ibid.* p.188-189)

"The emperor also learned from some Hindus, formulae to reduce the influence of the sun to his subjection, and commenced to read them mornings and evenings as a religious exercise. He also believed that it was wrong to kill cows, which the Hindus worship; he looked upon cow-dung as pure, interdicted the use of beef, and killed beautiful men instead of cows. The doctors confirmed the emperor in his opinion, and told him it was written in their books that beef was productive of all sorts of diseases and was very indigestible."

(*Ibid.* p.193)

"In this year the *Tamgha* (inland tolls) and the *Jazya* (tax on infidels), which brought in several krors of dams, were abolished, and edicts to this effect were sent over the whole empire."

(*Ibid.* p.198)

"Beef was interdicted, and to touch beef was considered defiling. The reason of this was that, from his youth, His Majesty had been in company with Hindu libertines, and had thus learnt to look upon a cow - which in their opinions is one of the reasons why the world still exists - as some thing holy. Besides, the Emperor was subject to influence of the numerous Hindu princesses of the harem, who had gained so great an ascendancy over him as to make him forswear beef, garlic, onions, and the wearing of a beard, which thing His Majesty still avoids. He had also introduced, though modified by his peculiar views, Hindu customs and heresies into the court assemblies, and introduces them still, in order to please and win the Hindus and their castes, he abstained from everything which they think repugnant to their nature, and looked upon shaving the beard as the highest sign of friendship and affection for him. Hence this custom has become very general."

(*Ibid.* p.202)

"The ringing of bells as in use with the Christians, and the showing of the figure of the cross, andand other childish playthings of theirs, were daily in practice."

(*Ibid.* p.203)

"In these days (991) new orders were given. The killing of animals on certain days was forbidden, as on Sundays, because this day is sacred to the Sun; during the first eighteen days of the month of Farwardin; the whole month of Aban (the month in which His Majesty was born); and on several other days, to please the Hindus."

(*Ibid.* p.209)

"He used to wear the Hindu mark on his forehead, and ordered the hand to play at midnight and at break of day. **Mosques and prayer-rooms were changed into store rooms, or given to Hindu chaukidars.** For the word *jama at* (public prayer) His Majesty used the term *jima* (copulation), and for *hayya ala*, he said *yalala talala*.

"The cemetery within the town was ordered to be sequestered."

(*Ibid.* p.210)

"These formulas were to take the place of our *salam* and the answer to the *salam*. The beginning of counting Hindu months should be the 28th day, and not the 16th because the latter was the invention and innovation of Bikramajit. The Hindu feasts, likewise, were to take place in accordance with this rule. But the order was not obeyed, though farmans to that effect, as early as 990, had been sent to Gujrat and Bengal."

(*Ibid.* p.215)

"Cases between Hindus should be decided by learned Brahmins, and not by Musalman Qazis."

(*Ibid.* p.215)

"Hindus who when young, had from pressure become Musalmans, were allowed to go back to the faith of the fathers. No man should be interfered with on account of his religion, and every one should be allowed to change his religion, if he liked. If a Hindu woman fall in love with a Muhammadan, and change her religion, she should be taken from him by force, and be given back to her family. People should not be molested if they wished to build churches and prayer rooms, or idol temples, or fire temples."

(*Ibid.* p.217)

12. William Finch who travelled India in the reign of Emperor Nuruddin Mohammad Jahangir from 1608 A.D. to 1611 A.D. saw the Hindus visiting the Birth Place of the Lord of Universe Sri Ram Chandra in Ramkot where Brahmins used to note down names of the visitors to that sacred place. Be it mentioned herein that in each and every prominent sacred places of the Hindus since time immemorial a class of Brahmins known as Panda has been helping the Devotees to perform customary rites as also noting down names of the Devotees. As such presence of Brahmin Pandas at Sri Ramjanmasthan during the visit of William Finch is conclusive proof that the Emperor Babar had not erected any Mosque over the said sacred site and Hindus were performing their traditional customary rites as laid down in Sri Skanda Puran. Relevant extract from page 176 of the book *Early Travels in India 1583 – 1619* by William Foster reads as follows:

"To Oudh [Ajodhya] from thence are 50c; a citie of ancient note, and seate of a Polan king, now much ruined; castle built foure hundred yeeres agoe. Heere are also the ruines of Ranichand [S] castle and houses, which the Indians acknowld[g]e for the great God, saying that he tooke flesh upon him to see the Tamasha of the World. In these ruines remayne certaine Bramenes, who record the names of all such

Indians as wash themselves in the river running thereby, which custome, they say hath continued foure lackes of yeeres (which is three hundred ninetie foure thousand five hundred yeeres before the world's creation). Some two miles on the further side of the river is a cave of his with a narrow entrance but so spacious and full of turnings within that a man may well lose himselfe there, if he take not better heed; where it is thought his ashes were buried. Hither resort many from all parts of India, which carry from hence in remembrance, certaine grains of rice as blacke as gun-powder which they say have beene reserved ever since. Out of the ruines of this castle is yet much gold tryed. Here is great trade and such abundance of Indian asse-horne that they make here of bucklers and divers sorts of drinking cups. There are of these hornes, all the Indian affirme, some rare of great price, no jewell comparable, some esteeming them the right unicorns horne".

(Early Travels in India 1583 – 1619 by William Foster p.176).

13. In his book *Description Historique Et Geographique De l' Inde*, Joseph Tieffenthaler who visited Sri Ramjanmsthan in the year 1770 A.D. during the reign of Emperor Shah Alam II (1759-1806 A.D.) evidenced the performance of customary rites by the Hindus in the central & left Halls of the Sri Ramjanmsthan Temple, Ajodhya in India. Tieffenthaler says that there was a *Vedi* i.e. *Sthandil* inside the said Temple which was being worshipped by the Devotees by prostrating and circumambulating it thrice, but he did not mention offering of prayer therein by the Muslims; from the said facts made available by an eye witness it becomes crystal clear that in the 1770 the Hindus were in use and occupation of the Sri Ramjanmsthan as their sacred shrine which has been described as Babari Mosque by the plaintiffs in their pleadings and it was not being used as a Mosque by the Muslims. The said book is written in Latin language, an English translation of his narrative of Ajodhya find place in the book *Modern Traveler, a Popular Description, Geographical, Historical and Topographical of the Various Country of the Globe – India Vol-III* published by James Duncan in the year 1828. Relevant extracts containing translation of Tieffenthaler's account from pages 312, 313, 314, 316 and 317 read as follows:

"Its appearance, in 1770, is thus described by *Tieffen theler*: "*Avad, called Adjudea by the Learned Hindoos* is a city of the highest antiquity. Its houses are, for the most part, only on mud, covered with straw or with tiles; many, however, are of brick. The principal street, running from S. to N., is about a *league* (mille) in length; and the breadth of the city is somewhat less. Its western part, as well as the northern, is situated on a hill; the north-eastern quarter rests upon *eminences*; but towards *Bangla*, it is level. This town has now but a scanty population, since the foundation of *Bangla* or *Fesabad*; a new town where the Governor has established his residence, and to which a great number of inhabitants of *Oude* have removed. On the southern bank of *Deva* (or *Goggrah*), are found various buildings erected by the *Gentoos* in memory of Ram, extending from east to west. The more remarkable place is that which is called *Sorgodoari*, that is to say, the

heavenly temple; because they say, that Ram carried away from thence to heaven all the inhabitants of the city. The deserted town was re peopled and restored to its former condition by *Bikaramajit*, the famous King of *Oojain*. There was a temple here on the high bank of the river; but *Aurangzebe*, ever attentive to the propagation of the faith of Mohammed, and holding the heathen in abhorrence, caused it to be demolished, and replaced it with a mosque with minarets, in order to abolish the very memory of the Hindoo superstition. Another mosque has been built by the Moors, to the east of this. Near the *Sargodoari* in an edifice erected by *Nabalroy* a former Hindoo governor. But a place more particularly famous is that which is called *Sitha Rassoe*, the table of *Sitha* (Seeta), wife of Ram; situated on an eminence to the south of the city. The emperor *Aurangzebe* demolished the fortress called *Ramcote*, and erected on the site, a *Mohammedan* temple with a triple dome. According to others, it was erected by *Baber*. There are to be seen fourteen columns of black stone, five spans in height, which occupied the site of the fortress. Twelve of these columns now support the interior arcades of the mosque: the two other form part of the tomb of a certain Moor. They tell us, that these columns, or rather these remains of skilfully wrought columns, were brought from Isle of *Lanca* or *Selendip* (*Ceylon*) by *Hanuman*, king the of monkeys. On the left is seen a square chest, raised, five inches from the ground covered with lime, about 5 ells in length by not more than four in breadth. The Hindoos call it *Bedi*, the cradle; and the reason is, that there formerly stood here the house in which *Beshan* (*Vishnoo*) was born in the form of Ram and were also, they say, his three brothers were born. Afterwards, *Aurangzebe*, or, according to others, *Baber*, caused the place to be destroyed, in order to deprive the heathen of the opportunity of practicing there their superstitions. Nevertheless, they still pay a superstitious reverence to both these places; namely, to that on which the *natal* dwelling of Ram stood, by going three times round it, prostrate on the earth. The two places are surrounded with a low wall adorned with battlements. Not far from this is a place where they dig up grains of black rice changed into little stones, which are affirmed to have been hidden underground ever since the time of Ram. On the 24th of the month *Tshet* (*Choitru*), a large concourse of people celebrate here the birth-day of Ram, so famous throughout India. This vast city is only a mile distant from *Bangla* (*Fyzabad*) towards the E.N.E."

(Ibid. 312-314)

"...Between three and four miles from *Fyzabad*, on the Southern bank of the *Goggrah*, there is a remarkable place planted with bushy trees, of which *Tieffenthaler* gives the following account:

"It is seated upon a hill somewhat steep, and fortified with little doors of earth at the four corners (of the enclosure). In the middle it is seen a subterranean hole, covered with a dome of moderate dimensions. Closed by is a lofty and very old tamarind-tree. A *piazza* runs round it. It is said that Ram, after having vanquished the giant *Ravan*, and returned from *Lanka* descended into this pit, and there disappeared: hence, they have given to this place the name of *Gouptar* (or

Gouptargath). You have here, then, a descent into hell, as you had at *Oude* and ascension to heaven". "As the scene of many of the leading events in the great epic poem of the *Ramayana*, *Oude* might be expected to abound with sports of traditional sanctity

(Ibid.p.316-317)

14. The East India Gazetteer of Hindustan of Walter Hamilton, 2nd Edition first published in 1828 A.D., records that the remains of the ancient city of Oude (Ayodhya), the Capital of Great Rama was still in existence wherein reputed sites of temples dedicated to Sri Rama, Sri Seeta, Lakshman and Hanuman are located and; and the pilgrims who perform the pilgrimage to Ayodhya they walk round the temples and idols, bathe in holy pools, and perform the customary ceremonies. Relying on said Gazetteer it is submitted that even in or before 1828

A.D. the Hindus were performing customary ceremonies at the birth place of the Lord of Universe Sri Rama ; and during said point of time there was no existence of alleged Babari Mosque as no such Mosque has been described in the four corners of the said Gazetteer. Relevant extract from page 353 of the said Gazetteer reads as follows:

"**Oude:** the ancient capital of the province of *Oude*, situated on the South side of the *Goggra*, seventy nine miles east from *Lucknow*: lat. 26°48' N., lon. 82°4'E By Abul Fazel in 1582 it is described as follows. " Oude is one of the largest cities of Hindostao. In ancient times this city is said to have measured 148coss in length and thirty-six coss in brendth. Upon sifting the earth which is round this city small grains of gold are sometimes found in it. This town is esteemed one of the most sacred places of antiquity." Pilgrimages resort to this vicinity, where the remains of the ancient city of *Oude*, the capital of the great Rama, are still to be seen; but whatever may have been its former magnificence it now exhibits nothing but a shapeless mass of ruins. The modern town extends a considerable way along the banks of the *Goggra*, adjoining *Fyzabad*, and is tolerable well peopled but inland is a mass of rubbish and jungle among which are the reputed sites of temples dedicated to *Rama*, *Seeta*, his wife, *Lakshman*, his general, and *Hunimaun* (a large monkey), his prime minister. The religious mendicants, who perform the pilgrimage to *Oude* are chiefly of the *Ramata sect*, who walk round the temples and idols, bathe in the holy pools, and performed the customary ceremonies"

(East India Gazetteer p.353)

15. Above referred East India Gazetteer of Hindustan of Walter Hamilton, 2nd Edition first published in 1828 A.D. in its preface declares that it contains accurate information the details whereof were collected by the persons best qualified from length of service residence on this spot, and established reputation to form a correct judgment of their authenticity. Relying on said declaration it is respectfully submitted that in or before 1828 A.D. there was existence of Sri Ramjanmsthan and temples in Ram-kot, Ayodhya and the Hindus were worshiping therein and there was no existence of alleged Babari Mosque. Relevant extract from page xiv-xv of the said Gazetteer reads as follows:

"To each description of any consequence, the authorities upon which it is founded are carefully sub-joined in succession according to their relative means, the author being particularly desirous to the credit where it is justly due, as well as to establish the high Character of the sources from whence his originally information has been drawn But no person is to be considered wholly responsible for any article, the materials being so intimately blended with each other, and the result of the author's own experience during a ten years' residence in India, that it would be impossible to define the limits of the respective properties. In various cases the narrative is given as closely as the necessity of condensing many thousand pages into a small compass would permit; in others it has been necessary to compare contradictory and conflicting testimonies, and to select that which appeared to rest on the most solid foundation. Conciseness has been particularly aimed at, and the endeavour to effect it has added greatly to the labour; for it is easy to write a description of a country when the materials are scanty, not so when the mass has been accumulating for half a century. In the official correspondence of the different presidencies the surveys and reports of one functionary are sometimes incorporated with those of another, so that occasionally the statement of one public officer cannot be discriminated from those of another; but notwithstanding these difficulties it will be clearly perceptible that the details of this work were generally collected under circumstances singularly favourable for the acquisition of accurate information, and by persons the best qualified from length of service residence on this spot, and established reputation to form a correct judgment of their authenticity."

(East India Gazetteer of Hindustan p.xiv-xv)

16. The Gazetteer of the Territories under the Government of East India Company and of the Native States on the continents of India by Edward Thornton, first published in 1858 records that on the right bank of the *Ghogra*, are extensive ruins, about 2000 years old said to be those of the forts of Rama, king of *Oude*, hero of the *Ramayana*, and otherwise highly celebrated in the mythological and romantic legends of India; the ruins still bear the name of *Ramgurh*, "or of fort of Rama"; according to native tradition temples thereon were demolished by Aurangzebe, who built a mosque on part of the site, but an inscription on the wall of the mosque, falsify the tradition as it attributes work to the conqueror Baber, from whom Aurangzebe was 5th in descent. The mosque is embellished with 14 columns of only 5 or 6 feet in height, but of very elaborate and tasteful workmanship, A *quadrangular* coffer of stone, whitewashed five *ells* long, 4 broad, and protruding 5 or 6 inches above ground, is pointed out as the cradle in which Rama was born as the 7th *Avatar* of *Vishnoo*; and is accordingly abundantly honoured by the pilgrimages and devotions of the Hindoos. From the aforesaid recording of the said Gazetteer it becomes crystal clear that Temple of Sri Ramjanmasthan was remodeled like mosque either by Babar or by Aurangzebe by utilizing the building materials of the said Temple and in spite of that the Hindus were worshipping on the Vedi established therein. It is submitted that the compilers has recorded two sources to ascertain the person who was responsible for damaging the Temple and converting the same into a mosque. Gazetteer says that according to tradition it was Aurangzebe

but according to an inscription it was Babar. The compiler recording both sources gave weightage to the information of the alleged inscription. As in earlier part of this argument it has already been established that the alleged inscriptions were neither ever fixed on said alleged Babari Mosque nor were in existence in any point of time the opinion of the compiler formed thereon crumbles down and only source of traditional information remains as reliable. Relevant extract from pages 739-740 of the said Gazetteer reads as follows:

“Oude- A town in the kingdom of the same name. It is situate on the right bank of the river *Ghogra*, which *Buchanan* considers here to be “fully larger than the Ganges at *Chunar*,” and which is navigable downwards to its mouth, upwards to *Mundiya Ghant*, in the district of *Bareilly*. It extends about a mile in a South-East direction, from the adjoining recent city of *Fyzabad*; the breadth of the town is something less from North-East to South-West, or from the river *Landwards*. The greater part of the site is on gently swelling eminences; but to the north-west, or towards *Fyzabad*, islo. Most of the houses are of mud, and thatched, though a few are tilted. Here, in a large building a mile from the river, is an extensive establishment, called *Hanumangurb*, or Fort of Hanuman, in honour of the fabled monkey-god the auxiliary of Rama. It has an annual revenue of 50,000 rupees, settled on it by *Shuja-ud-daulah*, formerly *Nawaub Vizier*. It is manage by a malik or abbot, the spiritual superior; and the revenues are dispensed to about 500 *bairagis* or religious ascetics, and other Hindoo mendicants of various descriptions; no Mussulman being allowed within the worlds other establishments of similar character are *Sugrimkills*, *Ram-Prashad-ka-Kana*, and *Bidiya-kuod*; maintaining respectively 100, 250, 200 *bairagis*. Close to the town on the East, and on the right bank of the *Ghogra*, are extensive ruins, said to be those of the forts of Rama, king of *Oude*, hero of the *Ramayana*, and otherwise highly celebrated in the mythological and romantic legends of India. *Buchanan* observes, “that the heaps of bricks, although much seems to have been carried away by the river, extend a great way; that is, more than a mile in length, and more than half a mile in width; and that, although vast quantities of materials have been removed to build the *Mahomedan Ayodha* or *Fyzabad*, yet, the ruins in many parts retain a very considerable elevation; nor is there any reason to doubt that the structure to which they belonged has been very great, when we consider that it has been ruined for about 2000 years.” The ruins still bear the name of *Ramgurh*, “or of fort of Rama”; the most remarkable spot in which is that from which, according to legend, Rama took his flight to heaven, carrying with him the people of his city; in consequence of which it remained desolat until re-peopled by *Vikramaditya*, the king of *Oujein*, half a century before the Christian era, and by him embellished with 360 temples. Not the smallest traces of these temples, however, now remain; and according to native tradition they were demolished by *Aurangzebe*, who built a mosque on part of the site, the falsehood of the tradition is however, proved by an inscription on the wall of the mosque, an attributing work to the conqueror Baber, from whom *Aurangzebe* was 5th in descent. The mosque is embellished with 14 columns of only 5

or 6 feet in height, but of very elaborate and tasteful workmanship, said to have been taken from the ruins of the Hindoo fanes, to which they had been given by the monkey general Hanuman, who had brought them from *Lanka* or Ceylon. Altogether, however, the remains of antiquity in the vicinity of the renowned capital must give a very low idea of the state of arts and civilization of the Hindoos at a remote period. A *quadrangular* coffer of stone, whitewashed five *ells* long, 4 broad, and protruding 5 or 6 inches above ground, is pointed out as the cradle in which Rama was born as the 7th *Avatar* of *Vishnoo*; and is accordingly abundantly honoured by the pilgrimages and devotions of the Hindoos ...”

(The Gazetteer of the Territories under the Government of East India Company p.739-740).

17. Gazetteer of the Province of Oudh first published in 1877-78 in its Chapter-III of the introduction records that The Birth-place of Sri Ram, the Lord of Universe is the most highly venerated of the sacred places to which Hind-pilgrims crowd. Relevant extract from page xxxi reads as follows:

“Long before the dawn of the authentic history, *Oudh* stands out in the full blaze of legend and poetry. *Ajodhya* its eponymous city was the capital of that happy kingdom in which all that the Hindu race reveres or desires was realized as it can never be realized again, and the seat of the glorious dynasty which began with the sun and culminated after 60 generations of blameless rulers in the incarnate deity and perfect man, Rama. Whether criticism will finally enroll the hero among the highest creations of pure imagination or accord him a semi-historical personality and a doubtful date, it is barren to speculate; history is more nearly concerned with the influence which the story of his life still has on the moral and religious beliefs of a great people, and the enthusiasm which makes his birth-place the most highly venerated of the sacred places to which its pilgrims crowd.”

(Gazetteer of the Province of Oudh p.xxxi)

18. The said Gazetteer of the Province of Oudh of 1877-78 records that *Ajodhya* is to the Hindus what *Mecca* is to the Mohammadans and *Jerusalem* to the Jews. The Gazetteer further says that as it is unconquerable city of the creator i.e. *Brahma* it is called *Ajodhya* and as Sri Ram had promised to return after completion of the period of exile this city is also known as *Oudh*. From the said recording of the Gazetteer it is crystal clear that since the *Tretayug* Sri *Ramjanmsthan* is most sacred place of the Hindus and performing their customary rights thereon is integral part of Hinduism. Relevant extract from page 2 of the said Gazetteer reads as follows:

“*Ajodiya* – (*Ajodhya*) – *Pargana Haweli Oudh* – *Tahsil Fyzabad* – *District-Fyzabad* : A town in the district of *Fyzabad*, and adjoining the city of that name is to the Hindu what *Mecca* is to the Mohammadans, *Jerusalem* to the Jews; it has in the traditions of the orthodox, a highly mythical origin, being founded for additional security, not on the transitory earth, but on the chariot wheel of the Great Creator himself. It lies 26°47' N latitude and 82°15' E longitude, on the banks

of the Gogra. The name *Ajodhya* is explained by well known local pundits to be derived from the sanskrit words 'ajud', 'unvanquished'; also 'Aj' a name of Brahma – 'The unconquerable city of the creator'. But *Ajodhya* is also called *Oudh* which in Sanskrit means a promise; in elusion, it is said, to the promise made by Ram Chandar when he went in exile, to return at the end of 14 years."

(Gazetteer of the Province of Oudh 1877-78 p.2)

19. The said Gazetteer of the Province of Oudh 1877-78 records that within *Ramkot* the stronghold of Lord of Universe Sri Ram Chandra, there were 8 Royal Mansions where dwelt Sri Ram, an incarnation, his father Sri Dasrath and Sri Dasarath's wives. The relevant extracts from page 3 of the said Gazetteer reads as follows:

"*Ramkot*: The most remarkable of those was, of course, *Ramkot*, the stronghold of Ram Chandar. This fort covered a large extent of ground, and, according to ancient manuscripts, it was surrounded by 20 *Bastions*, each of which was commanded by one of Ram's famous general after whom they took the names by which they are still known. Within the fort were 8 Royal mansion where dwelt the Patriarch *Dasrath*, his wives, and Ram, his defied son".

(Gazetteer of the Province of Oudh 1877-78 p.3)

20. The said Gazetteer of the Province of Oudh of 1877-78 records that prior to advent of Babar there were three important Hindu shrines namely the '*Janmasthan*' the *Swargaddwar Mundir*' also known as '*Ram Darbar*', and '*Treta-ke-Thakur*' and; without disclosing source of information it says that on the *Janamsthan* the in 1528 A.D. emperor Baber built the mosque while on other two sacred shrines Aurangzeb did so. From the said recording of the Gazetteer it is crystal clear that over the sacred shrine Sri Ramjanmsthan any one of the Mughal Emperor had erected a Mosque in flagrant violation of the Law of *Shar* which mandatorily forbids from usurping others' land as such any building erected over the land of the Hindu Deity i.e. The Lord of Universe Sri Ram from the building materials of the Temple of the said Deity does not come within the definition of Mosque. The relevant extract from page 6 of the said Gazetteer reads as follows:

"The *Janmasthan* and other temples – it is locally affirmed that at the *Muhammadan* conquest there were three important Hindu shrines, with but few devotees attached, at *Ajodhya*, which was then little other than wilderness. These were the '*Janmasthan*' the *Swargaddwar Mundir*' also known as '*Ram Darbar*', and '*Treta-ke-Thakur*'.

On the first of these the emperor Baber build the mosque, which still bears his name, A.D.1528 on the second, Aurangzeb did the same A.D.1658 – 1707; and on the third the sovereign or his predecessors build a mosque, according to well-known *Muhmmaden* principle of enforcing their religion on all those whom they conquer.

The *Janamsthan* marks the place where *Ram Chander* was born. The *swargaddwar* is the gate through which he passed into Paradise, possibly, the spot where his body was burnt. The *Treta-ke-Thakur* was

famous as the place where Rama performed a great sacrifice, and which he commemorated by setting up their images of himself and Sita."

(Gazetteer of the Province of Oudh 1877-78 p. 6)

21. The said Gazetteer of the Province of Oudh 1877-78 records that in 1855 A.D. in course of great rapture between the Hindus and the Muslims, loosing possession of Sri Ramjanmasthan for few days ultimately the Hindus re-occupied their said sacred shrine suffering 11 casualties and inflicting 75 casualties on Muslim-side. The Gazetteer further records that up to that time the Hindus and Muslims alike use to worship in the mosque-temple. Since British rule a railing had been put up to prevent the disputes within which, in the mosque, the Muslims used to pray; while outside the fence the Hindus had raised a platform on which they used to make their offerings. From the said recordings of the Gazetteer it becomes crystal clear that at least till 1855 A.D. the Hindus were worshipping in the same structure which has been described as Babari Mosque in the plaint of the instant suit and, a platform now known as *Ramchabutara* was erected by some Hindus after commencement of British Rule i.e. in 1856 A.D. as such the *Sthandil* i.e. *Vedi* (cradle) which was being worshipped by the Hindus in 1770 A.D. and seen by Joseph Tieffenthaler was other than the platform which was subsequently built in 1556 A.D. Be it mentioned herein that from the several applications of the self-proclaimed Mutawallis, Muezzins, Khattibs under or through whom the plaintiffs are claiming had seen it is crystal clear that since time immemorial Hindus are worshipping in the central Sanctum Sanctorum of the Temple Structure which has been described as Babari Mosque in the plaint of the instant suit, which makes it clear that the Hindus did not care for illegal and arbitrary prohibition imposed upon them by the British Rulers in 1856 A.D. or thereafter as alleged at all. Relevant extract from page 7 of the said Gazetteer reads as follows:

"Hindu and Musalman – The *Janmasthan* is within a few hundred paces of the *Hanomangarhi* in 1855, when a great rapture took place between the Hindus and the Muhammadans, the former occupied the *Hanomangarhi* in force, while the Musalmans took possession of the *Janmasthan*. The Mohammadans on that occasion actually charged up the steps of the *Hanomangarhi*, but were driven back with considerable loss. The Hindus then followed up this success, and at the third attempt took the *Janmasthan* at the gate of which seventy-five *Muhammadan* were buried in the 'martyr's grave' (*ganj-i-shahidan*). Eleven Hindus were killed. Several of the King's regiment were looking on all the time but their order were not to interfere. It is said that up to that time the Hindus and Mohammadans alike use to worship in the mosque-temple. Since British rule a railing has been put up to prevent the disputes within which, in the mosque, the Mohammadans pray; while outside the fence the Hindus have raised a platform on which they make their offerings. A second attempt was made shortly afterwards by *Molvi Amir Ali* of *Amethi*; the object was to seize the alleged site of an old mosque on the *Hanoman Garhi*".

(Gazetteer of the Province of Oudh 1877-78 p.7)

22. The said Gazetteer of the Province of Oudh of 1877-78 records that in the great fair of the *Ram Navami* i.e. Janm-mahotsva of Sri five lakh people used to participate. Said Gazetteer further records that about 150 years ago National feeling of the Hindus aroused by the tyranny of Aurangzeb or by success of Marathas or by the compilation of Ramayana in Hindi i.e. Sri Ramacharitmanas of Sri Goswami Tulsidas Ajodhya became again esteemed as a holy place; it grew favour each year, and then in all India, perhaps except the *Jagannath* festival and that at *Hardwar*, there was none to equal the *Ram Naumi* celebration at Ajodhya. It is needless to say that according to holy scripture of the Hindus Sri Skand-puran since the days of Sage Narad who was contemporary of Lord of Universe Sri Ram, it became integral part of Hinduism to celebrate Janm-mahotsav of the Lord of Universe Sri Ram and perform customary rituals at Sri Ramjanmsthan in Ayodhya. Be it mentioned herein that neither there was nor there is such a place other than Sri Ramjanmsthan, Ramkot, Ayodhya which had/has capacity to attract and accommodate such a huge assemblage of the Devotees at least 150 years back from the 1877-8 A.D. the year of the publication of the instant Gazetteer i.e. 1727-28 A.D. it is further submitted that from the said facts as recorded in this Gazetteer it becomes crystal clear that after the death of Aurangzeb Sri Ramjanmsthan has become centre of Hinduism. Relevant extracts from pages 14, 451 and 452 of the said Gazetteer reads as follows:

“There are 96 Hindu temples, of which 63 are in honour of *Vishnu* and 33 of *Mahadeo*; there are 36 mosques. There is also a vernacular school. There is little trade at Ajodhya. The great fair of the *Ramnauami*, on which 5,00,000 people assemble, is held here; it is described in the district of *Fyzabad*”.

(Gazetteer of the Province of Oudh of 1877-78. p. 14)

“Religious sect of Fyzabad- Religion in this district is of more than ordinary interest. Ajodhya, as is related in the account of that town, is the great centre of the hero worship which has selected the ancient king *Ram Chandar* as the object of its adoration. At the *Ram Naumi* festival 5,00,000 people assemble in honour of that potent monarch and innumerable shrines have been erected to *Ram Chandar*, his brother *Bharat*, his wife *Sita* and his ally in the great *dekkon war Hanoman*, the Monkey. This saint worship at the same time does not seem to interfere with the more spiritual theologh which concerns itself with the wholly unearthly beings, - *Vishnu*, *Mahadeo* and *Bhawani* or *Debi*”.

(Gazetteer of the Province of Oudh of 1877-78p.451)

“...it may, however, be remarked here that the Hindu revival at Ajodhya is one of the most remarkable things in modern times. In Buddhist times, the place had no peculiar sanctity, although there were doubtless temples and shrines. Long afterwards, during many centuries, *Gya*, *Benares*, *Puri* and *Muttra* kept their reputation, while Ajodhya became a wilderness and famous hunting-ground. About a hundred and fifty years ago there was a revival; where a national feeling was aroused by the tyranny of Aurangzeb or by the success of the *Marahatas*, or by the translation into popular language of the Ramayana, somehow or other Ajodhya became again esteemed as a holy place; it grew favour each

year, and now in all India, perhaps except the *Jagannath* festival and that at *Hardwar*, there is none to equal the *Ram Naumi* celebration at *Ajodhya*.”

(Gazetteer of the Province of Oudh of 1877-78 p.452)

23. There are 20 terms and conditions of the Jizya out of which condition no.3 is that the Jimmis shall not prevent Muslim Travellers from staying in Idol Temples and, condition no.4 is that the Muslims shall have right to stay in the house of Jimmis as a guest for 3 days. As under the Islamic Rulers the Hindus was Jimmis in Oudh Province till its annexation to British Rule i.e. 1856 A.D. during this period they were bound to follow the terms and conditions of Jizya as modified by Great Imam Abu Haneef. From the readings of the said Gazetteer of 1877 – 1878 it appears that invoking the condition no.3 of the Jizya the Muslim travellers used to stay in Sri Ramjanmsthan compound and during their such temporary stay it might be that those travellers used to offer prayer in the rooms of the *Dharamshala* of the said Temple compound which was misconstrued by the compiler of the said Gazetteer. Even now-a-days the Muslims during their travels used to offer prayer in trains as also at the place of their temporary abode. As offering prayer in a building which has images is prohibited in Islam it can be said with certainty that no Muslim was offering prayer in Sri Ramjanmsthan Temple which has been described as Babari Mosque in the plaint of the instant suit. In nut-shell it can be inferred that only Hindus were performing religious rites and worship in the Idol Temple of the Lord of Universe Sri Ram. In the book “The Delhi Sultanate” 4th Edn. edited by renowned Historian Sri R.C.Majumdar and published in 1990 by Bharatiya Vidya Bhavan, Bombay on page 619 an extract from the book “Zakhirat-ul-Muluk” written by Shaikh Hamadani containing 20 terms and conditions of Jizya has been reproduced. Relevant extract from the said book reads as follows:

“There is another mandate relating to those subjects who are unbelievers and protected people (zimmis). For their governance, the observance of those conditions which the Caliph ‘Umar laid in his agreement for establishing the status of the fire-worshippers and the people of the Book (Jews and Christians) and which gave them safety is obligatory on rulers and governors. Rulers should impose these conditions on the zimmis of their dominions and make their lives and their property dependent on their fulfillment. The twenty conditions are as follows:

1. In a country under the authority of a Muslim ruler, they are to build no new homes for images or idol temples.
2. They are not to rebuild any old buildings which have been destroyed.
3. Muslim travelers are not to be prevented from staying in idol temples.
4. No Muslim who stays in their houses will commit a sin if he is a guest for three days, if he should have occasion for the delay.
5. Infidels may not act as spies or give aid and comfort to them.
6. If any of their people show any inclination towards Islam, they are not to be prevented from doing so.
7. Muslims are to be respected.

8. If the zimmi are gathered together in a meeting and Muslims appear, they are to be allowed at the meeting.
 9. They are not to dress like Muslims.
 10. They are not to give each other Muslim names.
 11. They are not to ride on horses with saddle and bridle.
 12. They are not to possess swords and arrows.
 13. They are not to wear signet rings and seals on their fingers.
 14. They are not to sell and drink intoxicating liquor openly.
 15. They must not abandon the clothing which they have had as a sign of their state of ignorance so that they may be distinguished from Muslims.
 16. They are not to propagate the customs and usages of polytheists among Muslims.
 17. They are not to build their homes in the neighbourhood of those of Muslims.
 18. They are not to bring their dead near the graveyards of Muslims.
 19. They are not to mourn their dead with loud voices.
 20. They are not to buy Muslim slaves."
24. Staying of Muslims in the Temple or House of Jimmi was not only in theory but in practice also. During his retreat from Tibet campaign Bakhtiar Khilji took refuge in an Idol Temple in Kamrup which has been described in the book "Riyazu-s-Salatin" A History of Bengal on its pages 66 -67. During his travel Ibn Battuta stayed in a House of a Jimmi lady in Kaynuk, which fact has been recorded on page 138 of the book "Ibn Battuta" translated and selected by H.A.R. Gibb First Published in 1929 and, reprinted in 2007 by Low Price Publication, Delhi. Relevant extracts from the aforesaid two books read as follows:

"Muhammad Bakhtiar engulfed in the sea of confusion and perplexity, despaired of every resource. After much striving, he got news that in the neighbourhood there was a very large Temple, and that Idols of Gold and Silver were placed there in great pomp. It is said that there was an Idol in the temple which weighed a thousand maunds. In short, Muhammad Bakhtiar with his force took refuge in this temple, and was busy improvising means for crossing the river. The Rajah of Kamrup had ordered all his troops and subjects of that Country to commit depredations."

(Riyazu-S-Salatin. P.67)

"Kaynuk is a small town in the territories of Sultan Orkhan Bek, inhabited by infidel [Christian] Greeks under Muslim protection. There is only one household of Muslims in the place, and that belongs to the governors of the Greeks, so we put up at the house of an old infidel woman. This was in the season of snow and rain. She treated us well, and we spent that night in her house. Now this town has no trees or vineyards; the only thing cultivated there is saffron, and the old woman

brought us a great quantity of it, thinking that we were merchants and would buy it from her.”

(Ibn Battuta translated by H.A.R. Gibb reprint 2007 p.138)

25. It is noteworthy that in A-In-I Akbari Vol.II at page 182 it has been recorded that at that time in Ayodhya there were only two tombs of Seth and the Prophet Job of six and seven yards in length respectively. But from the Gazetteer of the Province of Oudh it is known that in the mean time another tomb Noah was also added and a story was concocted that the tomb of Nuh was built by Alexander the Great i.e. in 4th B.C., as this tomb of Nuh did not find place in A-In-I Akbari's account. In fact the tomb of Noah or Nuh is in the town Najaf in Iraq. In the light of aforesaid facts it becomes crystal clear that this tomb was brought into existence in deceitful manner in later days and to glorify it a fiction was created that it was existing in 4th B.C. It is respectfully submitted that the Babari Mosque has also been brought into fiction in later days i.e. after infliction of damages to Sri Ramjanmasthan Temple by the Emperor Aurangzeb and to glorify this subsequently name of the Emperor Babar was tagged with said disputed structure, which structure in fact was a Hindu temple and remained as such even after its defilement by the Emperor Aurangzeb. Relevant extract from page 11 and 12 of the Gazetteer of the Province of Oudh 1877-78 reads as follows:

“The Tombs of the Patriarchs. – Adjoining the Maniparbat are two tombs, of which General Cunningham writes that “they are attributed to Sis paighambar and Ayub paighambar, or the Prophets Seth and Job. The first is seventeen feet long and the other twelve feet. These tombs are mentioned by Abul Fazl, who says: ‘Near this are two sopuljarai monuments, one seven and the other six cubits in length. The vulgar pretend that they are the tombs of Seth and Job, and they relate wonderful stories of them.’ This account shows that since the time of Akbar the tomb of

Seth must have increased in length, from seven cubits, or ten and a half feet, to seventeen feet, through the frequent repairs of pious Musalmans.” These tombs are also mentioned at a later date, in the Araish-i-Mahfil. To these tombs Colonel Wilford adds that of Noad, which is still pointed out near the police station. The Colonel's account is as follows: “Close to Ajodhya or Oudh, on the banks of the Gogra, they show the tomb of Noah, and these of Ayub, and Shis or Shish, (Job and Seth). According to the account of the venerable Darvesh who watches over the tomb of Nuh, it was built by Alexander the Great, or Sikandar Rumi. I sent lately (A.D. 1799) a learned Hindu to make enquiries about this holy place: from the Musalmans he could get no further light; but the Brahmans informed him that where Nuh's tomb stands now, there was formerly a place of worship dedicated to Gapesha; and close to it are the remains of a baoli, or walled well, which is called in the Puranas Ganapat Kund. The tombs of Job and Seth are near to each other, and about one bow-shot and a half from Nuh's tomb; between them are two small hillocks, called Soma-giri, or the mountains of the moon: according to them these tombs are not above four hundred years old; and owe their origin to three men, called

Nuh, Ayub, and Shis, who fell there fighting against the Hindus. These were, of course, considered as shahids, or martyrs; but the priests who officiate there, in order to increase the veneration of the superstitious and unthinking croud, gave out that these tombs were really those of Noah, Job, and Seth, of old. The tomb of Nuh is not mentioned in the *Ain-i-akbari*, only those of Job and Seth."

On these quotations I have only to add that the distance between the tombs is greater than stated, being nearly a mile as the crow flies; while it is not the tomb of Nuh, but those of the other two men mentioned, that are close to the Gancsha Kund."

(Gazetteer of the Province of Oudh 1877-78 p.11 – 12)

26. Ibn Battuta in his account of travels tells us that he visited the graves of Ali, Adam and Noah in the town Najaf in Iraq. This fact makes it clear that the so called tomb of Nuh in Ayodhya is not that of the original Nuh whose tomb is in Najaf, but to give antiquity and authenticity to their fiction the interested person tagged name of Alexander the Great as builder of the said tomb in Ayodhya though it is Historical truth that the Alexander had never been in Ayodhya. In similar manner interested persons tagged name of the Emperor Babar with Sri Ramjanmasthan Temple once upon a time which was defiled, damaged and tried to be converted into Mosque in the 8th decades of the 17th Century by the Emperor Aurangzeb ultimately which resulted into failure. The relevant extract of the Ibn Battuta Travels in Asia and Africa 1325-1354 (published by Low Price Publications, Delhi, 2007 Reprint of the 1st Edn. 1929) from page 81 and 82 reads as follows:

"We went on from there and alighted in the town of Mash-had 'Alf at Najaf. It is a fine town, situated in a wide rocky plain- one of the finest, most populous, and most substantially built cities in 'Iraq'. It has beautiful clean bazaars. We entered by the [outer] Bab al-Hadra, and found ourselves first in the market of the greengrocers, cooks and butchers, then in the fruit market, then the tailors' bazaar and the *Qaysaruya*, then the perfumers' bazaar, after which we came to the [inner] Bab al-Hadra, where there is the tomb, which they say is the tomb of Alf. One goes through the Bab al-Hadra into a vast hospice, by which one gains access to the gateway of the shrine, where there are chamberlains, keepers of registers and eunuchs. As a visitor to the tomb approaches, one or all of them rise to meet him according to his rank, and they halt with him at the threshold. They then ask permission for him to enter saying "By your leave, O Commander of the Faithful, this feeble creature asks permission to enter the sublime resting-place," and command him to kiss the threshold, which is of silver, as also are the lintels. After this he enters the shrine, the floor of which is covered with carpets of silk and other materials. Inside it are candelabra of gold and silver, large and small. In the centre is a square platform about a man's height, covered with wood completely hidden under artistically carved plaques of gold fastened with silver nails. On this are three tombs, which they declare are the graves of Adam, Noah, and Alf. Between the tombs are dishes of silver and gold,

containing rose-water, musk, and other perfumes; the visitor dips his hand in these and anoints his face with the perfume for a bleassing."

(*Ibn Battuta translated by H.A.R. Gibb reprint 2007 p.81-82*)

27. The report of the Settlement of the Land Revenue Officer of the Faizabad District by A.F. Millett, the Officiating Settlement Officer; published in 1880 records the similar facts as contained on page 7 of the Gazetteer of the Province of Oudh 1877-78 wherein the facts that in 1855 A.D. there was intense fighting between the Hindus and Muslims and the Hindus after being dispossessed regained possession of Sri Ramjanmasthan without loosing time by killing seventy five Muslims and loosing their eleven men. This report further records that prior to commencement of British Rule in Oudh i.e. 1856 A.D. the Hindus and the Muslims both used to pray in the Mosque – Temple and after the British Rule a railing was put up to prevent Hindus from entering into the disputed structure to avoid the dispute. It is needless to repeat and reiterate that in spite of such preventive measures of the British Rule the Hindus continue with their worship in the Sri Ramjanmasthan Temple which has been described as Babari Masjid in the plaint of the instant suit. Relevant extract from pages 235-36 reads as follows:

"668. If Ajudhya was then little other than wild, it must at least have possessed a fine temple in the *Janamsthan*; for many of its columns are still in existence and in good preservation, having been used by the *Musalman*s in the construction of the *Babri* mosque. These are of strong close-grained dark slate-colored or black stone called by the natives '*kasoti*' (*literally touch-stone*) and carved with different devices. To my thinking, these strongly resemble Buddhist pillars that I have seen at *Benares* and elsewhere. They are from seven to eight feet long, square at the base, centre, and capital, and round or octagonal intermediary.

669. *Hindu and Musalman difference* – The *Janmsthan* is within a few hundred paces of the *Hanuman Garhi*. In 1855, when a great rupture took place between the Hindu and Mahomedans the former occupied the *Hanuman Garhi* in force, while the Musalmans took possession of the *Janmasthan*. The Mohamedans on that occasions actually charged up the steps of the *Hanuman Garhi*, but were driven back with considerable loss. The Hindus then followed up this success, and at the third attempt took the *Janmsthan*, at the gate of which 75 *Mahomedans* are buried in the '*Martyrs grave*' (*Ganj-Shahid*). Several of the King's regiment were looking on all the time, but their orders were not to interfere. It is said that up to that time, the Hindus and Mahomedans alike used to worship in the mosque-temple. Since British rule, a railing has been put up to prevent disputes, within which in the mosque the Mahomedans pray, while outside the fence the Hindus have, raised a platform on which they make their offerings."

(*The report of the Settlement of the Land Revenue Officer of the Faizabad District by A.F. Millett, Edn.1880. p.235-236*).

28. That there was no mosque even till 1855 is established from the following narration in Faizabad Gazetteer 1960 at p. 63, where it is stated as under:-

“ In 1855 a serious conflict between vairagis and the Muslims at the site of Hanumangarhi in Ayodhya, both claiming it to be a place of worship connected with their respective religions. King Wajid Ali Shah is said to have appointed a Committee to investigate this matter which held a public meeting in Gulab Bari. It appears that among those assembled no one testified the existence of the mosque. Therefore, the Committee unanimously decided the issue in favour of the Vairagis. When the report of the Committee reached Lucknow, it caused a sensation among the Muslims. A Council of action was formed of which Maulvi Amir Ali Amethi (District Lucknow) was elected leader. He was staying at Suhali and succeeded in attracting a large number of followers. On learning this the Vairagis started arrangements for the defence of the place. Wajid Ali Shah then ordered a regiment to guard it. At last on November 7, 1855 Maulavi Amir Ali started for Rudauli with his followers. On refusing to retrace his steps when ordered to do so by Captain Barlow, a fight ensued in which he and most of his followers were killed.”

The Gazetteer for the above has in the Footnote appended referred to Kawal-ud-din Haider: Qaisar-ut-Tawarikh or Tarikh-i-Avadh Part II pp. 110 & 128 Mirza Zan : Radiqa-i-Shuda (Lucknow 1772 A.H. / 1855-56 A.D.)

(Faizabad Gazetteer of 1960.p.63 as reproduced in para 40 of the W.S. of the defendant no.20)

29. That in Faizabad Gazetteer of 1960 at pages 351 and 352 says that in the middle of 19th Century Ayodhya was regarded as a strong hold of Hinduism. From the said fact as recorded in the Gazetteer it is very much apparent that at the time of annexation of Oudh Province to the British Rule in the middle of 19th Century Hindus were strong enough to retain control at least over one of the most holiest place of worship of the Hindus i.e. Sri Ramjanmasthan at Ayodhya and they did so as it is very much apparent from the several applications made on and from 1858 to the date of inception of instant litigations by the alleged Mutawallis, Muezzins, Khattibs etc. Relevant extract of the aforesaid Gazetteer as quoted in paragraph 40 of the written statement of the this defendant no.20 reads as follows:

“with the departure of the Court, the Hindus were left to themselves and numerous temples and monestries sprang into existence. Naval Rai, the Deputy of Nawab Safdar Jung built a fine house in Ayodhya which still stands on the river front. Probably this rise in importance was due to the creating popularity of th Ramcharitra Manas of Tulsidas and the progress of this place became even more rapid after the annexation of the Avadh by the British. Before the middle of the nineteenth century Ayodhya was regarded as a stronghold at Hinduism....”

(Faizabad Gazetteer of 1960.p.351-352 as reproduced in para 40 of the W.S. of the defendant no.20)

30. The Gazetteer of India Volume II (3rd Edn. 1990 published by the Director of Publication Division Ministry of Information and Broadcasting Government of

India) records the fact that even the Rulers like Firuz Shah Tughluq and Aurangzeb found it impossible to stop religious practices of the Hindus. Relevant extract from page 362 of the said Gazetteer reads as follows:

“ Firuz Shah Tughluq confessed his helplessness in preventing Hindus from openly blowing their conches, beating drums and going daily to the river Yamuna by the side of his palace, to worship their idols. Even Aurangzeb found it impossible to rule absolutely according to Islamic law and had to concede to certain extra-Islamic practices of his predecessors. In fields relating to religion, the Hindus were allowed full freedom to have their cases tried by their own communal courts. Even in matters of property and several other non-religious affairs if both the parties were Hindus, the case was referred to the judgement of pundits or Hindu lawyers. The land-revenue system under Muslim rulers and the ceremonies and procedure at the Mughal court bear the unmistakable evidence of Indian traditions. These deviations from Muslim law, however, did not affect the fundamental Islamic character of the state.”

(The Gazetteer of India Volume II p.362)

31. Niccolao Manucci who was contemporary of the Mughal Emperor Aurangzeb came in India in 1656 and served as artillery commander in the army of Prince Dara Sukoh and on 8th June 1658 participated in the decisive battle of Samugarh, near Agra fought between The Armies of Prince Dara Sukoh and Prince Aurangzeb. After defeat of Dara Sukoh he joined Army of Emperor Aurangzeb. In December 1662 he made an expedition eastwards and travelled through Patna, Rajmahal, Dhakkah, Sunderbans, Hoogly and then returned to Agra by way of Qasimbazar. At Agra he adopted medicine as a profession. Here he met with Raja jai Singh of Amber and joined as a Captain of artillery to his son Prince Kirat Singh. And accompanied Raja Jai Singh during his campaign against Chhatrapati Maharajadhiraj Shivaji in between March 1664 to July 1665. After the death of Raja Jai Singh in or about 1678 he came in service of Prince Shah Alam I, who later on succeeded emperor Aurangzeb, as his physician and ultimately left Mughal dominion in 1686. He died in India in 1717 (Source Storia Do Mogor Volume 1 Introduction Page lvi-lxvii). In his book “Storia do Mogor” or Mogul India 1653 – 1708 Vol-III at page 244 under the caption of ‘Hindu Holy Places’ Niccolao Manucci records the facts that several temples including the four famous temples of the Hindus at Ayodhya, Kashi (Varanasi), Mathura and Hardwar were demolished by the Emperor Aurangzeb but shortly thereafter Hindus thronged to their those sacred sites and started worshipping as they were doing in past. From the said eye witness account leaves no doubt that Sri Ramjanmsthan Temple at Ayodhya was demolished by Aurangzeb and not by the Emperor Babur. As the Temple of Ayodhya has been enumerated along with three other famous temples which means it was Sri Ramjanmsthan as no other Temple can be equalised and compared with Sri Vishveshwar’s Temple at Varanasi, Sri Krishna Janmsthan Temple at Mathura and the famous Temple at Hardwar. Relevant extracts from the said book of Niccolao Nanucci read as follows :

“In this realm of India, although King Aurangzeb destroyed numerous temples there does not thereby fail to be many left at different places,

both in his empire and in the territories subject to the tributary princes. All of them are thronged with worshipers; even those that are destroyed are still venerated by the Hindus and visited for the offering of alms. The Hindus assert that in the world there are seven principal places where it is possible to obtain what one has imagined and desired – that is to say, in cases where a person wishes to become Emperor or King, wealthy, powerful or to attain other positions of the same order. Now they ordinarily hold that on dying a person's soul is transferred according to the deeds he has done; if he has done good, his soul will pass into some one of consideration or of wealth, and should the deceased have done evil, his soul will be sent in to some animal – elephant, camel, buffalo, cow, tiger, wolf, a bird, a snake, a fish et cetera ...”

(Storia do Mogor or Mogul India 1653 – 1708 Vol-III p.244)

“...bands of interested persons make these lengthy pilgrimages, enduring a thousand hardships on the way, only at the end to drown of their own choice, without considering where they are about to take up their abode.

The chief temples destroyed by King Aurangzeb within his kingdom were the following:

1. Maisa (?) Mayapur,
2. Matura (Mathura),
3. Caxis (Kashi),
4. Hajudia (Ajudhya)

and an infinite number of others; but, not to tire the reader, I do not append their names.”

(Ibid p.245)

32. In the book 'India in the 17th Century (Social, Economic and Political) Memoirs of Francois Martin 1670-1694 (translated by Lotika Varadarajan and Published by Manohar Publishers 1984 Edn.), Francois Martin writes that the Emperor Aurangzeb caused demolition of the temples in the cities and villages of Gujrat whereafter people erected temples within their homes and saved them from demolition by giving presence to the Governors. He further records that when Emperor Aurangzeb's army on his command tried to demolish a temple in Karnataka the Hindus fought and repulsed the Imperial Army and one of his Hindu noble revolted against him and left his service. From the facts recorded by Francois Martin who was Governor of French East India Company it becomes crystal clear that the Emperor Aurangzeb was leaving no stone unturned in inflicting humiliation, oppression and excesses on Hindus in course whereof he was causing demolition of the Idol Temples but the same was by hook or by crook being opposed by the Hindus and they were not giving up to their religious places and rites. This fact corroborate the fact as recorded by the Niccolao Manaucci to the effect that the said Emperor caused demolition of Hindu temples but immediately thereafter Hindus thronged at their sacred sites of the temples and started their usual worship on those sites. Relevant

extracts from page 914 of vol.-II part-1, p.1249 & 1256 vol.-II, part-II read as follows:

“When it had come to the knowledge of the Emperor that many rich Gujarati banias had built temples within their homes to perform their devotions, in his religious fervour, he ordered that the Governors of the province should carry out an inspection. All the temples in the cities and villages had been destroyed. Now these inner sanctums were also to be laid low and the least sign of the practice of the Hindu religion was to be wiped out. The numbers of this community, particularly at Hyderabad and Cambay where they were to be found in large numbers, were greatly alarmed at these instructions. It was said that the banias managed to circumvent the Mughal orders by giving presents to the Governors who thereupon took their inspection tours very lightly.”

(ibid p.914)

“ Following the Emperor’s orders with regard to the destruction of temples, the Moors brought one down in the Carnatic. This incited the Hindus to revolt in an attempt to prevent this action. The two communities clashed openly and both sides sustained loss of life. As a result, the Moors were forced to postpone their demolition activities to a later date.”

(ibid p. 1249)

“Yachappa Nayak, the Hindu noble to whom I have referred earlier in my narrative, on seeing that the Mughal army after repeated orders from the Emperor, was bent on the destruction of the Hindu temples, left Mughal service and entered the territory of Gingee with his men. From there, he wrote to all the Hindu Princes, urging them to unite against the enemy of their community and religion.”

(ibid p.1256)

33. In the aforesaid book Francois Martin also records that in spite of injunctions of the Mugal Emperor the Hindus did not stop from performing their traditional religious ceremonies and continue to perform it in violation of prohibitory orders. This recording also corroborate the facts as recorded by Niccolao Manucci to the effect that inspite of the demolition of the temples the Hindus did not abandoned their sacred places and soon thereafter started performing their customary religious rituals on those sites. From the recording of the Gazetteers of 1877-78 and the Settlement Report of Faizabad it becomes crystal clear that according to those official records also Hindus were worshiping in Sri Ramjanmsthan Temple described as Babri Mosque in the plaint of the instant suit at least prior to annexation of Oudh to British Rule in 1856. Relevant extracts from page 877-878 & 916 of vol.-II Part.-I read as follows:

“The Hindus in Surat practice a certain rite during the month of August. I am not sure whether it is at the time of the full moon or new moon that they perform it. They go for boat rides on the river and throw large number of coconuts into the water, while all the ships and boats moored on the river are gaily bedecked with flags and buntings. This is an age-old practice based on the superstition that if this is done the ships which they have at sea will have successful voyages. Although

many Hindu superstitions have been tolerated by the Moors, the Emperor had given explicit instructions that these festivals should be banned. The Governor forbade this practice but his orders were not always carried out. Some of the banias and members of the other castes did not show any signs of having departed from their normal customs and practices."

(ibid p. 877-878)

"The annual ceremony of throwing coconuts into the river was celebrated on 25 August. I have spoken about this earlier. Despite the Mughal injunction against the practice of this ancient rite by Hindus, it continues unabated. Even among Muslims, those possessing ships on the high seas sometimes join in. It marks the opening of the sailing season."

(ibid p.916)

34. Ibn Battuta in his account of travels tells us that in Bud-Pattan city though there was not a single Muslim inhabitant it had a mosque which was being looked after and maintained by the Brahmins with due respect; though he did not describe it as noble gesture of Hindus but says that it was due to panic of some evil consequences fell down on Hindus but his said conjecture and surmise is based on his believed that as the Christians and Jews had not honoured sacred places of the Muslims how Idolaters do it. If we go through the instances as recorded in the book 'Spirit of Islam' by Syed Ameer Ali it appears that excesses were committed by the Jews and Christians against the Muslims. But in fact as India was a religiously tolerant Country and Hindus always used to honour Religions and religious places of the others it can be inferred that the Hindus were maintaining said Mosque on account of their respect to religious place of Muslims. This spirit of the Hindus makes it clear that the Hindus neither can defile nor claim over the religious places of others and as Sri Ramjanmasthan described as Babari Mosque in the plaint is being possessed, claimed and asserted as their most holiest sacred place then indeed it is birth place of Lord of Universe Sri Ram. The relevant extract of the Ibn Battuta Ki Bharat Yatra (published by National Book Trust of India Reprint 1997 of the 1st Edn. 1933) from page 203 reads as follows:

इसके अनंतर हम बुद-पत्तन नामक एक बड़े नगर में पहुंचे जो एक बड़ी नदी के तट पर बसा हुआ है। नगर में एक भी मुसलमान न होने के कारण जहाज के मुसलमान यात्री समुद्र-तट पर बनी हुई एक मस्जिद में आकर ठहरते हैं। यह बंदर अत्यंत ही रमणीक है, यहां का जल भी अत्यंत मीठा है। अधिक मात्रा में उत्पन्न होने के कारण सुपारियां यहां से चीन तथा (उत्तर) भारत को भेजी जाती हैं।

नगर-निवासी बहुधा ब्राह्मण ही है। हिंदू जनता इन लोगों को बड़े आदर की दृष्टि से देखती है। परंतु मुसलमानों के प्रति इसका घोर द्वेष होने के कारण एक भी मुसलमान यहां निवास नहीं करता। मस्जिद विध्वस्त न करने का यह कारण बतलाया जाता है कि एक ब्राह्मण ने कभी इसकी छत तोड़कर कड़ियां निकाल अपने गृह में लगा दी थीं। उसके घर में आग लगने पर कुटुंब-संपत्ति सहित वह वहीं जलकर राख हो गया। इस घटना के पश्चात् समस्त जनता मस्जिद को आदर-भाव से देखने लगी और इसके बाद किसी ने उसका अपमान नहीं किया। यात्रियों को पानी पीने के लिए मस्जिद के बाहर एक जलकुंड तथा पक्षियों का प्रवेश रोकने के लिए द्वारों में जालियां भी नगर-निवासियों ने बनवा दीं।

(Ibid p.203)

35. Be it mentioned herein that the Sacred Compilation Jami' At-Tirmidhi (Vol.-2) Hadith 1063 enumerates five types of martyrs as such from the name of a place Ganj Shahidan it cannot be inferred that it was a place of the graves of the soldiers who lost their lives in a battle in between Emperor Babur and the then ruler of Ajodhya. Contrary to this it can be inferred that the inhabitant of that place in totality died with plague that is why people used to call it *Ganj Shahidan*. According to dictionary 'Urdu Hindi Sabdakosh' (published by Uttar Pradesh Hindi Sansthan) *Ganj* means *Nagar* as such Ganj Shahidan means city of martyrs. Said Hadith reads as follows:

"1063. Abu Hurairah narrated that the Messenger of Allah said: "The martyrs are five: Those who die of the plague, stomach illness, drowning, being crushed and the martyr in the cause of Allah." **(Sahih)**

(Jami' At-Tirmidhi Vol.-2 Hadith 1063)

PART - VII

THERE WAS NO PERSON NAMED MIR KHAN OR MIR BAQI OR ABDUL BAQI OR ABDUL BAQI ISPHAHANI ASSOCIATED WITH EMPEROR BABUR AS SUCH BUILDING OF ALLEGED BABARI MOSQUE AT SRI RAMJANAMSTHAN BY SUCH FICTITIOUS COMMANDER / MINISTER / GOVERNOR OF THE EMPEROR IN 923 A.H. (1516-17 A.D.), IN 930 A.H. (1523-24A.D.) AND IN 935 A.H. (1528-29 A.D.) CANNOT AND DOES NOT ARISE AT ALL:

1. It is alleged that in 935 AH (corresponding to 15th September 1528 to 5th September 1529) one Mir Baqi named Counsellor & Minister of Emperor Babur built a Masjid in Ayodhya at the site of Sri Ramajanamasthan by demolishing the Temple of Sri Ramchandraji and utilizing its materials. In fact, nowhere in Babur-Nama a person by name of Mir Baqi has been mentioned. In the Indian context the name Baqi suffixed by Saghawal, Ming-Bashi has figured at 9 places in Beveridge's Translated Babur-Nama.

2. In 932 A.H. *Baqi Shaghawal* figures at pages 463, 546 of the Babur-Nama relevant extracts wherefrom read as follows:

“At the end of our first stage, I bestowed Dibalpur on Baqi *Shaghawal* and sent him to help *Balkh*; sent also gifts, taken in the success of Milwat, for (my) younger children and various train in Kabul.”

2. Chief scribe (f. 13 n. to 'Abdu'l-wahhab). Shaw's vocabulary explains the word as meaning also a “high official of Central asian sovereigns, who is supreme over all *qazis* and *mullas*”.

(Babur-Nama Page 463)

“I uplifted his head with favour and kindness, distinguishing him amongst his fellows and equals. When Baqi *shaghawal* went [to Balkh] I promised him a *ser* of gold for the head of each of the ill-conditioned old couple; one *ser* of gold was now given to Mir Hamah for Baba Shaikh's head, over and above the favours referred to above.”

(Babur-Nama p.546)

3. In the year 934 A.H. Beg *Baqi mingbashi*, Baqi of Tashkint and Baqi Shaghawal figures at pages 590, 601 and 602 of the Babur-Nama relevant extracts wherefrom read as follows:

“(Jan. 12th) On Sunday the 19th of the month Chin-timur SI. was put at the head of 6 or 7000 men and sent ahead against Chandiri. With him went the begs *Baqi mingbashi* (head of a thousand), Quj Beg's (brother) Tardi Beg, 'Ashiq the taster, Mulla Apaqa, Muhsin Duldai and, of the Hindustani begs, Shaikh Guran.”

(Babur Nama P. 590)

(Sunday March 15th Jumada II. 23rd) On this day the carts were taken over, and at this same dawn the army was ordered to cross. At beat of drum news came from our scouts that the enemy had fled. Chin-timur SI. was ordered to lead his army in pursuit and the following leaders also were made —ursuers who should move with the Sultan and not go beyond is word : Muhammad 'All Jang-jang, Husamu'd-din 'All (son) of Khalifa, Muhibb-i-'ali (son) of Khalifa, Kuki (son) of Baba

) Qashqa, Dost-i-muhammad (son) of Baba Qashqa, *Baqi of Tashkent*, and Red Wali. I crossed at the Sunnat Prayer, the camels were ordered to be taken over at a passage seen lower down. That Sunday we dismounted on the bank of standing-water within a kuroh of Bangarmawu. Those appointed to pursue the Afghans were not doing it well; they had dismounted in Bangarmawu and were scurrying off at the lid-day Prayer of this same Sunday.)

(Babur-Nama p.601)

“(March 28th) On Saturday the 7th of Rajab we 2 or 3 kurohs from Aud above the junction of the Gagar (Gogra) and Sard[a]. Till today Shaikh Bayazid will have been on the other side of the Sird[a] opposite Aud, sending letters to the Sultan and discussing with him, but the Sultan getting to know his deceitfulness, sent word to Qaracha at the Mid-day Prayer and made ready to cross the river. On Qaracha’s joining him, they crossed at once to where were some 50 horsemen with 3 or 4 elephants. These men could make no stand ; they fled ; a few having been dismounted, the heads cut off were sent in. Following the Sultan there crossed over Bi-khub (var. Ni-khub) SI. and Tardi Beg (the brother) of Quj Beg, and Baba Chuhra (the Brave), and Baqi Shaghawal. Those who had crossed first and gone on, pursued Shaikh Bayazid till the Evening Prayer, but he flung himself into the jungle and escaped. Chin-timur dismounted late on the bank of standing-water, rode on at midnight after the rebel, went as much as 40 kurohs (80 m.), and came to where Shaikh Bayazid’s family and relations (nisba?) had been ; they however must have fled. He sent gallopers off in all directions from that place; Baqi Shaghawal and a few braves drove the enemy like sheep before them, overtook the family and brought in some Afghan prisoners.”

(Babur-Nama p. 602)

4. In the year 935 A.H. Baqi, Baqi Tashkindi, Baqi Beg figures at pages 679, 684 and 685 of the Babur-Nama relevant extracts wherefrom read as follows:

“(May 27th) On Friday (19th) I rode out to visit Sikandarpur and Kharid. Today came matters written by ‘Abdu’l-lah (kitabdar) and Baqi about the taking of Luknur.

(Babur-Nama p.679)

“(May 28th) On Saturday (20th) Kuki was sent ahead, with a troop, to join Baqi.”

(Babur-Nama p.679)

“(June 13th) After crossing, we waited one day (Monday 7th) for all the army-folk to get across. Today Baqi Tashkindi came in with the army of Aud (Ajodhya) and waited on me.”

(Babur-Nama p.684)

“(June 17th) Next day (Friday 11th) at the Other Prayer, one of Baqi Beg’s retainers came in. Baqi had beaten scouts of Biban and Bayazid,

killed one of their good men, Mubarak Khan Salwdni, and some others, sent in several heads, and one man alive.”

(Babur-Nama p.685)

(June 20th) On Monday (14th) Jalal Tashkidi came from the begs and sultans of the advance. Shaikh Bayazid and Biban, on hearing of their expedition, had fled to the pargana of Mahuba. As the Rains had set in and as after 5 or 6 months of active service, horses and cattle in the army were worn out, the sultans and begs of the expedition were ordered to remain where they were till they received fresh supplies from Agra and those parts. At the Other Prayer of the same day, leave was given to Baqi and the army of Aud (Ajodhya).

(Babur-Nama p. 685)

5. From the above mentioned extracts of the Babur-Nama it becomes crystal clear that *Baqi* has been mentioned by Babur as *Baqi Tashkindi* (i.e. Baqi, the inhabitant of Tashkent presently in Uzbekistan), *Baqi Shaghawal* (i.e. Baqi, the head Kazis and Mullas), *Baqi Ming-Bashi* (i.e Baqi, the commander of 1000 troops), *Baqi Beg* (i.e. Baqi, the Junior commander) and Baqi but nowhere in his Memoir Emperor Babur has mentioned him as *Mir Baqi*. From the Book Babar written by Stanley Lane-poole it is known that the Amir or Mir, Khan & Mirza titles were meant for the royal descents. Since nowhere in four corners of Babur-Nama epithet Mir has been used for Baqi it can be inferred with certainty that he was not a royal descent. From the aforesaid extracts it is also very much apparent that the ‘Begis’ were junior Army Commanders and ‘Sultans’ were Senior Army Commanders, that is why in a campaign against Sheikh Bayazid being a Beg, Baqi Saghawal was put under the command of Chin-timur Sultan. Holding a meeting of Sultans and begs by Emperor Babur leaves no doubt that these two were designations of the Senior and Junior commanders respectively. Till 1929 Baqi was only Beg i.e. a junior commander of 1000 troops. Thus it is clear that commander of Audh’s Army was *Baqi Tashkindi* who was *Mingbashi* the head of Qazis & Mullas in February 1526 AD, a Beg (Junior Commander) and Shaghawal (commander of 1000 troops) in 1528-29 AD and nor Mir Baqi which figures in the latter forged Inscriptions supplied to A.S. Beveridge for her publication in 1921 as also to Z.A. Desai for his publication in A.S.I’s Report 1964-65 because in the former Inscriptions supplied to A. Fuhrer for his publication in A.S.I.’s Report in 1889 the builder of the alleged Masjid was named as *Mir Khan*.

PART . VIII

THERE WAS NO WAR IN 935 AH (1528 AD) IN AYODHYA NOR THE EMPEREOR BABUR BUILT GRAVEYARDS OR MOSQUE AT RAMJANAMSTHAN DESCRIBED AS BABARI MOSQUE IN THE PLAINT OF THE INSTANT SUIT:

1. The plaintiffs as made out in the paragraph 1 and 2 of the plaint is that in 935 A.H. there was a battle in between the Emperor Babur and the then Ruler of the Ayodhya in Ayodhya. After attaining victory Babur made graveyards for his soldiers who had lost their lives in the said battle and erected a Mosque for the Muslims of Ayodhya. Be it mentioned herein that according to English Calendar said 935 AH commenced on 15th September, 1528 and ended on 5th September, 1529 and for this whole year's account is available in Babur-Nama save and except 3 days' account of 15th September 1528 to 17th September 1528. On 18th September, 1528 Babur was in his court at Agra. On 20th September, he left for Gwalior, said facts prove it beyond doubt that during said three days Emperor Babur was nowhere in the vicinity of Ayodhya but far away at Agra. Prior to defeat of Sultan Ibrahim Lodi in 1526 Mustafa Farmuli was his Governor of Oudh and just after the Sultan's defeat Shaikh Bayazid Farmuli was appointed Governor of Oudh by the victorious King Babur. He remained in the Good-book of the Emperor at least till December, 1527. In fact Babur himself was ruler of Oudh and his appointee Shaikh Bayazid was Governor thereof. Even when Shaikh Bayazid became hostile from January 1528 onwards neither Babur nor Shaikh Bayazid entered in the city of Ayodhya nor there was any fighting in Ayodhya between them either in 935 AH or in any other year during the life time of emperor Babur as such losing lives by Emperor Babur's soldiers in action in Ayodhya city and creation of Graveyards for those fall in action as well as erection of Mosque is false, frivolous, and concocted- one. The Plaintiffs have failed to plead and prove name of any independant ruler of Ayodhya as well as fighting between any such independant King and the Emperor Babur as such the instant Suit is liable to be dismissed with exemplary cost.
2. Babur -Nama (Translated by Anette Susannah Beveridge and Reprinted in 2007 by Low Price Publications, Delhi first published in 1921) tells us that after defeating the Sultan Ibrahim Lodi in the battle of Panipat on 8th of Rajab 932 AH corresponding to 20th day of April 1526 Babur became King of Delhi, Agra and Oudh (Babur-Nama p.472-74). Mustafa Farmuli was Sultan Ibrahim Lodi's Governor of Oudh and died before Sultan's defeat. His younger brother was Shaikh Bayazid (Farmuli). After Sultan Ibrahim Lodi's defeat, Shaikh Bayazid together with Firuz Khan and Mahmud Khan went to serve Babur. Babur writes that "I shewed them greater kindness and favour than was their claim." He gave Shaikh Bayazid 1 krur, 48 laks and 50,000 tankas from Aud, Firuz Khan 1 krur, 46 laks and 5,000 tankas from Jaunpur and Mahmud Khan 90 laks and 35,000 tankas from Ghazipur (*ibid* p. 527). Shaikh Bayazid, Firuz Khan, Mahmud Khan and Qazi Jia who were highly favoured commanders to them Eastern Paraganas were given (*ibid* p. 530). In January 1527 Humayun placed Shaikh Bayazid in Oudh (*Ibid* p.544).
3. In December 1527 Babur got wild news about Shaikh Bayazid (Babur-Nama P. 585). On the eve of Chanderi expedition Babur received a bad news on 28th

January, 1528 that "the troops appointed for the East (i.e. against Bayazid) had fought without consideration, been beaten, abandoned Laknau, and gone to Qanuj" (*Ibid* p. 594). After conquering Chanderi Babur again got news on 22nd February, 1528 that his troops had abandoned Qanuj (Kannauj) and gone to Rapri; whereas the enemy's army under Biban, Bayazid and Maruf had taken over Shamsabad. Babur himself moved towards Kannauj. On hearing his march, Bayazid, Biban and Maruf crossed Ganga and seated themselves in its eastern bank opposite Kannauj for preventing Babur's passage (*Ibid* 598). But Babur and his Army, after having built bridge over the river Ganga, crossed the river on 15th March, 1528. But due to one day's delay in crossing the river Ganga, the enemy escaped. Babur ordered Chin-timur Sultan to chase Trio. Babur also placed Baqui Tashkinti under Chin-timur Sultan's command. But the pursuers did not do well. On 16th March Babur dismounted at Bangarmawn (*Ibid* 599-601).

4. On March 21, 1528 Babur visited Laknau and crossed Gomati, while he was one or two march away from Oudh on request of Chin -timur Babur sent a reinforcement of 1000 braves (Babur-Nama p.601). On 28th March, 1528 in course of his pursuit of rebel Shaikh Bayazid Babur dismounted 2 or 3 kurhos (i.e. 6 or 8 miles) from Oudh above the junction of Gagar (Goghgra) and Sirda. [John Leyden, and William Erskine created confusion by identifying Sirda with Sarju; whereas Annette Susannah Beveridge rightly identified it with Kali-Sarda on the Chouka affluent of the Gogra and not Sarju river.] At that time Bayazid was far away on otherside of the Sirda opposite to Oudh. Babur's army and generals who had crossed over first pursued Shaikh Bayazid till the evening prayer but he flung into jungle and escaped. Chin-timur Sultan chased Afghans dismounted late on the bank of standing-water, rode on at midnight after the rebel, went as much as 40 kurhos (80 miles) where Bayazid's family and relations had been, they however had fled. He sent gallopers off in all directions from that place.. Baqi *Shaghawal* and few brave drove the enemy, overtook family and brought in some Afghan prisoners. He stayed on that ground few days in order to settle the affairs of Audh. During his said stay Babur heard from the people that the land lying along Sirda 7 or 8 kurohs (14-16 miles), above Audh, was a hunting-ground. Mir Muhammad the raftsmen was sent out and returned after looking at the crossing over the Gagar-water (Gogra) and the Sirda-water (Chauka). Babur, fond of hunting, rode out to hunt on 2nd April, 1528 (*ibid* p.602)
5. There is no recording of Diary in Babur-Nama from 3rd April to 17 September, 1528. Ayodhya was under the Muslim rule for about last 300 years and under Babur's domain since 20th April 1526. As Bayzid was neither stationed in Ayodhya City nor his garrison, citadel or Army was there; question of a battle in Ayodhya for freeing Ayodhya from his control also didn't arise at all.
6. In 934 AH last entry in Babur-Nama is of Jumada II, 12th 934 corresponding to 2nd April 1528 A.D. while in 935 first entry therein is of Muharram 3rd 935 corresponding to 18th September 1528. As 935 AH commenced on 15th September 1528 for this year only 3 day's entries are missing. What Babur did during this interregnum can be fairly built up. A. S. Beveridge points out that "much can be gleaned of Babur's occupations during the 5 months of the lacuna from his chronicle of 934 and 935 A.H. which makes several references

to occurrences of last year," If such references are put together it appears that Babur carried on his military operations against Afghans in the east and south Bihar as well. During this period five and half months he stayed at Jaunpur, Chausa and Buxar in defeating and driving away the Afghans and compelling them to take shelter in eastern Bihar and Bengal and after settling the affairs of the eastern region Babur returned to Agra (source: Ibid. 603-04).

PART - IX

APPLICABILITY OF LAW FOR THE TIME BEING IN FORCE IN OUDH DURING SULTANATE AND MUGHAL PERIOD:

1. As from the pleading of the plaintiffs as contained in the paragraphs 1 and 2 of the plaint of the instant suit, plaintiffs' claim of creation of mosque and graveyards by Emperor Babur falls during the period of 1526 to 1530 AD, the validity of the wakf and the title of the wakif which is precondition for creation of a wakf can be decided only by applying the law of 'Shar' (Hanefi School) which was the Law for the time being in force.
2. Neil B.E. Baillie in his Book 'A Digest of Mahomedan Law' compilation and translation from authorities in the original Arabic on the subjects to which it was usually applied by British Courts of Justice in India in preface of its Part-First containing the doctrines of the Hanifia Code of Jurisprudence at page vii-viii (Second Edition 1875 published by Smith Elder, & Co., London) records that in the Province of Oudh since inception of Muslim rules in India the Hanifia Code was the general law of the country and after the assumption of regal dignity (on 19th October, 1818) by *Ghazi-ood-deen Hyder*, the Hanifia was gradually superseded by the Imameia Code. In the preface of Part-Second of the said book at page xi-xii (2nd Edn. 1887 published by Smith Elder, & Co., London) he reiterates that in the United Provinces of Oudh since inception of Muslim rules in India and till the accession of Umjad Ally Shah (who reigned from 17th May, 1842 to 13th February, 1847) the law of the Oudh province was Soonnee Hanifite Law. Relevant extracts from the said compilations read as follows:

"The Moohummudan Sovereigns of India were Soonnees of the Hanifia sect, and the Hanifia code was the general law of the country, so long as it remained under the sway of Moohummudans. Even in Oude, where the actual rulers were of the Shia persuasion, yet, so long as they preserved a nominal allegiance to the Sovereigns of Delhi, the Hanifia code remained the law of the province. After the assumption of regal dignity by *Ghazi-ood-deen Hyder*, the Hanifia was gradually superseded by the Imameia code, until at length the latter had become the general law of the country at the time of its annexation to the British empire."

(Baillie's 'A Digest of Mahomedan Law' Part-I, at p.vii-viii)

"The Mussulmans of India are generally Soonnes of the Hanifite sect.
...

The process of assimilation was less rapid in India, where, though several of the Nawabs, or local Governors, were Sheeuhs, they acknowledged at least a nominal dependence on Delhi, and never ventured to make any ostensible change in the law of their provinces. This was eminently the case in Oude, the Nawabs of which were hereditary Viziers of the empire, and though long virtually independent, did not throw off their allegiance to it till the year 1818, when the Nawab Vizier *Ghazi-ood-deen Hyder*, with the consent, and, indeed, at the suggestion, of the British Government, assumed the title of Padshah

or King. It was not, however, till the accession of Umjad Ally Shah, that any formal alteration was made in the law."

(Baillie's 'A Digest of Mahomedan Law' Part-II, at p.xi-xii)

3. The Gazetteer of India (Vol.II at p.361-363) records that during the Sultanat & Mughal period the medieval state under Muslim rule was a theocracy. The sovereignty of *Allah* was unquestioned. The supremacy of the *Shar* was always acknowledged. Relevant portion of the said Gazetteer reads as follows:

"The medieval state under Muslim rule was definitely a theocracy since it had all its essential elements- the sovereignty of God and government by the direction of God through priests in accordance with divine laws. The Sultans of Delhi considered themselves as deputies or assistants of the Caliph who was God's viceregent. *Sher* Shah and Islam Shah assumed the title of Caliph and the Mughal emperors, from Akbar to Aurangzeb, those of 'Shadow of God', 'Caliph of God', and 'Agent of God on Earth'. The sovereignty of God was unquestioned. The supremacy of the *shar* was always acknowledged, though Akbar added to the *shar* the state-laws. Under him and his two immediate successors, Islamic law ceased to be the exclusive code of government. Jahangir and Shah Jahan, however, did not regard themselves as above Muslim law and the former even assumed the role of 'Protector' of Islam and *Shar*. The *Shar* is based on the Quran, the word of God, and *Hadith* or the Prophet's interpretation of the word of God. Hence, the *Shar* consists of divine commands and not human ordinances.

(Gazetteer of India, 3rd Edn. Vol.II p.362-363)

4. The Gazetteer of India (Vol.II at p.361-363) records that during the Sultanat & Mughal period the law of *Shar* which is based on *Quran*, the word of God, and *Hadith* or the Prophet's interpretation of the word of God was the law of the land. Relevant portion of the said gazetteer reads as follows:

"The first question that arises in this context is whether the state under the Sultans of Delhi and the Mughal emperors was Islamic or otherwise. This has been the subject of a lively controversy among modern historians. According to Muslim constitutional law, the world is divided into *dar-ul-harb* or 'abode of war' and *dar-ul-Islam* or 'abode of Islam'; and a *dar-ul-Islam* is a country which is under the rule of a Muslim sovereign and where the ordinances of Islam have been established. The Sultans of Delhi acknowledged the sovereignty of the Caliph and considered their kingdom as a part of Dar-ul-Islam of which the Caliph was the juridical head. India under the Mughal emperors was governed by the Muslim law *Shar*. The fact that the bold and daring Alau'd-din Khalji consulted the *Qadi* of Bayana to ascertain what was legal proves the supremacy of the *shar*, and neither he nor Muhammad Tughlaq with his revolutionary inclinations, dared violate it. Even Akbar the Great, considered infidel by orthodox Muslims, did not disregard Muslim law."

(Gazetteer of India, 3rd Edn. Vol.II p.361)

5. The Gazetteer of India (Vol. II at p.368-369) records that till 1579 AD. the Muslim rulers of India acknowledged the legal sovereignty of the Caliph. Relevant portion of the said gazetteer reads as follows:

“The Sultans of Delhi acknowledged the legal sovereignty of the Caliph. According to Muslim political jurisprudence no Sultan had legal right to the throne unless he was recognized by the Caliph.

...

The claim of caliphal supremacy over the Mughal empire was finally overthrown when Akbar assumed the title of Imam and *Amir-ul-muminin* by virtue of the *Mahdar* (Declaration) of A.D. 1579. The coins and the *Khutba* mention him as Caliph and *Amir-ul-muminin*. By becoming the chief *mujtahid*, he also challenged the pretensions of the *Safavi Shahs* of Persia who claimed suzerainty over the Mughal empire, on the ground that both Babur and Humayon had sought and obtained their military help. It was under Akbar that the monarchy in India became absolutely independent of any foreign or external authority. His successors maintained this tradition. The Mughal emperors from the time of Akbar assumed the authority of the Caliph and called their capital *daru'l-khilafat*.

(Gazetteer of India, 3rd Edn. Vol.II p.368-369)

6. In (2008) 8 SCC 12, *Faqrudin v. Tajuddin*, the Hon'ble Supreme Court held that a title does not remain in vacuum. It has to be determined keeping in view the law operating in the field viz. religious law or statutory law or customary law, etc. Relevant paragraph nos.44 & 45 of the said judgment read as follows:

“44. The jurisdiction of the Board of Revenue being limited, no title could have been conferred upon the plaintiff. Title in or over a land will depend upon the statutory provisions. A title does not remain in vacuum. It has to be determined keeping in view the law operating in the field viz. religious law or statutory law or customary law, etc.

45. Revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. The statutory rules must be held to be operating in a limited sense. The provisions of Rule 13 of the Matni Rules laying down a rule of primogeniture will have no application in relation to the offices of *sajjadanashin* and *mutawalli*, which are offices of different nature. They are *stricto sensu* not hereditary in nature. It is well settled that an entry in the revenue records is not a document of title. Revenue authorities cannot decide a question of title.”

Faqrudin v. Tajuddin, (2008) 8 SCC 12, (at page 28)

7. In AIR 1980 SC 707 “*Krishna Singh v. Mathura Ahir*” the Hon'ble Supreme Court held that in applying the personal law of the parties, a Judge cannot introduce his own concepts of modern times but should enforce the law as derived from recognised and authoritative sources of Hindu law, i.e., *Smritis* and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modified

or abrogated by statute. Relevant paragraph no. 17 of the said judgment read as follows:

“17. It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the judgment of various High Courts, except where such law is altered by any usage or custom or is modified or abrogated by statute.”

AIR 1980 SC 707 (at p.712)

8. In AIR 1953 SC 394 “Rao Shiv Bahadur Singh v. State of Vindhya Pradesh the Hon’ble Supreme Court held that on change of sovereignty over an inhabited territory the pre-existing laws continue to be in force until duly altered. Relevant paragraph nos.10, 17 & 21 of the said judgment read as follows:

“10. In this contention our attention has been drawn to the fact that the Vindhya Pradesh Ordinance 48 of 1949 though enacted on 11-9-1949, i.e. after the alleged offences were committed, was in terms made retrospective by S. 2 of the said Ordinance which says that the Act “shall be deemed to have been in force in Vindhya Pradesh from the 9th day of August 1948”, a date long prior to the date of the commission of the offences. It was accordingly suggested that since such a law at the time when it was passed was a valid law and since this law had the effect of bringing this Ordinance into force from 9-8-1949 it cannot be said that the convictions are not in respect of ‘a law in force’ at the time when the offences were committed. This, however, would be to import a somewhat technical meaning into the phrase “law in force” as used in Art. 20. “Law in force” referred to therein must be taken to relate not to a law “deemed” to be in force and thus brought into force but the law factually in operation at the time or what may be called the then existing law. Otherwise, it is clear that the whole purpose of Art. 20 would be completely defeated in its application even to ‘ex post facto’, laws passed after the Constitution. Every such ‘ex post facto’ law can be made retrospective, as it must be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act. It is obvious that such a construction which nullifies Art. 20 cannot possibly be adopted. It cannot, therefore, be doubted that the phrase “law in force” as used in Art. 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law “deemed” to have become operative by virtue of the power of legislature to pass

retrospective laws. It follows that if the appellants are able to substantiate their contention that the acts charged as offence in this case have become such only by virtue of Ordinance No. 48 of 1949 which has admittedly been passed subsequent to the commission thereof, then they would be entitled to the benefit of Art. 20 of the Constitution and to have their convictions set aside. This leads to an examination of the relevant pre-existing law.

AIR 1953 SC 394 (at p.398-399)

17. It has been urged, however, that though this may have been the intention, the intention did not become operative for reasons to be presently stated. Section 2 of Ordinance No. 4 of 1948 while extending the laws of Rewa State to the rest of Vindhya Pradesh refers to the publication of such laws in the Rewa Gazette as a requisite therefor, and it is pointed out that the Rewa Gazette itself came into existence only in October 1930 (Vide page 386 of the printed Paper book), whereas the Penal Code and the Criminal Procedure Code were brought into operation in the Rewa State in 1921 and 1922. It is also pointed out that the deletion of the requirement of previous publication in the Rewa Gazette by Ordinance No. 20 of 1949 came into operation only when that Ordinance was published in the Vindhya Pradesh Gazette, i.e. on 15-5-1949 sometime after the commission of the offence in this case. To substantiate the view that only such of the Rewa laws which were previously published in the Rewa Gazette were understood as having been originally extended to Vindhya Pradesh by Ordinance No. 4 of 1948, a decision of the Vindhya Pradesh High Court dated 29-10-1949 in Criminal Appeal No. 27 has been brought to our notice which assumes that the Prisoners Act in force in India was not in force in Vindhya Pradesh as there was no previous publication of it, in the Rewa Gazette. On the other side a notification of Vindhya Pradesh Government dated 19-3-1949 and published in the Vindhya Pradesh Gazette dated 30-3-1949 has been brought to our notice which specifically mentions all the laws by then in force in Vindhya Pradesh and shows "Indian Penal Code - 'mutatis mutandis'- with necessary adaptations" as item 86 thereof. This is relied on to show that there must have been a previous publication thereof in the Rewa Gazette before integration. There seems to be considerable force in this argument that in respect of the various Rewa State laws which have been enumerated in the above-mentioned Gazette as having been brought into force in Vindhya Pradesh (some of these are Acts prior to 1930) there must have been previous publication in the Rewa Gazette sometime after 1930, and that neither Ordinance No. 20 of 1949 nor the decision of Vindhya Pradesh High Court relating to Prisoners' Act (which is not one enumerated in the above Gazette) can be taken to negative it. We are 'prima facie' inclined to accept this view and to think that the Indian Penal Code as in force in Rewa became extended to Vindhya Pradesh by Ordinance No. 4 of 1948. But even assuming that S. 2 of the Ordinance failed to achieve its purpose on account of misconception as to the previous publication of any particular Rewa law in the Rewa Gazette, it is clear that that Rewa law would continue

to be in force in the Rewa portion of United State of Vindhya Pradesh, as the Vindhya Pradesh law therefor, on the principle recognised in 'T Moo Ind App 175 (PC) (H)', that on change of sovereignty over an inhabited territory the pre-existing laws continue to be in force until duly altered. Since in the present case we are concerned with offences committed in relation to the Rewa State portion of Vindhya Pradesh, there can be no reasonable difficulty in holding that the Criminal Law of Rewa State, i.e., the Indian Penal Code and the Criminal Procedure Code with adaptations 'mutatis mutandis' was the relevant law for our present purpose by the date of integrated administration, viz., 9.3.1948."

AIR 1953 SC 394 (at p.400-401)

21. It must therefore be held that the rulers of the native States had prior to 1947, the authority to pass extra-territorial laws relating to offences committed by their own subjects and vesting in their own courts the power to try them, except where the contrary is made out by evidence in the case of any individual State, and that so far at least as Rewa State is concerned, the contrary cannot be held to have been proved.

AIR 1953 SC 394 (at p.403)

9. In AIR 1940 P C 116 "Shahid Ganj v. S. G. P. Committee" the Privy Council held that Court cannot uproot titles acquired prior to annexation by applying law which did not then obtain as law of land as also that there is every presumption in favour of the proposition that a change of sovereignty would not affect private rights .Relevant extracts of the said judgment reads as follows:

"It has been made clear by learned counsel for the appellants that the plaintiffs do not now claim any relief extending beyond the actual site of the mosque building. The first question to be asked with reference to this immovable property is the question : In whom was the title at the date when the sovereignty of this part of India passed to the British in 1849? It may have been open to the British on the ground of conquest or otherwise to annul rights of private property at the time of annexation as indeed they did in Oudh after 1857. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act or in any other Act authorising the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property : cf. (1905) 2 KB 391.3 3. West, Band Gold-mining Co. v. The King, (1905) 2 KB 391=74 LJ KB 753=93 LT 207=21 TLR 562.

Who then immediately prior to the British annexation was the local sovereign of Lahore? What law was applicable in that State to the present case ? Who was recognized by the local sovereign or other authority as owner of the property now in dispute? These matters do not appear to their Lordships to have received sufficient attention in the present case. The plaintiffs would seem to have ignored them. It

is idle to call upon the Courts to apply Mahomedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognized and enforced as such. If it be assumed, for example, that the property in dispute was by general law or by special decree or by revenue-free (muafi) grant vested in the Sikh gurdwara according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that Ranjit Singh took great interest in the gurdwara and continued endowments made to it by the Bhanji Sardars as was held by Hilton J. (20th January 1930) presiding over the Sikh Gurdwaras Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh Gurdwara under a muafi grant from the Sikh rulers. It was for the plaintiffs to establish the true position as at the date of annexation. Since the Sikh mahants had held possession for a very long time under the Sikh State there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahomedan law as modified by the Limitation Act, 1908..”

AIR 1940 PC 116 (at p.120-21)

10. In AIR 1922 Privy Council 123 “Vidya Varuthi v. Baluswami” the Privy Council held that; from the year 1774, the Legislature, British and Indian, has affirmed, time after time, the absolute enjoyment by the Hindus and Muslims of their laws and customs so far as they are not in conflict with the Statutory laws. It would be a serious inroad into their rights if the rules of the Hindu and Muslim laws were to be construed with the light of legal conceptions borrowed from abroad. Relevant extracts of the said judgment reads as follows:

“From the year 1774, the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs, so far as they are not in conflict with the statutory laws, by Hindus and Mahommedans. It would, in their Lordships’ opinion, be a serious inroad into their rights, if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in pari materia. The vice of this method of construction by analogy is well illustrated in the case of Vidyapurna Tirthaswami v. Vidyavidhi Tirtha Swami (3) where a Mohant’s position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships’ opinion, in the subsequent case, which arose also in the Madras High Court, of Kailasam Pillai v. Nataraja Thambiran (4) To this judgment their Lordships will have to refer further later on.”

AIR 1922 PC 123 (at p.126)

11. The Oudh Laws Act, XVIII of 1876 made the Muslim Law and Hindu Law applicable to the persons of respective faiths. Section 3 of the said Act reads as follows:

"3. The law to be administered by the Courts of Oudh shall be as follows:-

(a) the laws for the time being in force regulating the assessment and collection of land revenue;

(b) in questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family-relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be—

(1) any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;

(2) any Muhammadan law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, except in so far as such law has been, by this or any other enactment, altered or abolished, or has been modified by any such custom as is above referred to;

(c) the rules contained in this Act;

(d) the rules published in the local official Gazette as provided by section 40, or made under any other Act for the time being in force in Oudh;

(e) The Regulations and Acts specified in the second schedule hereto annexed, subject to the provisions of Section 4 and to the modifications mentioned in the third column of the same schedule;

(f) subject to the modifications hereinafter mentioned, all enactments for the time being in force and expressly, or by necessary implication, applying to British India or Oudh, or some part of Oudh;

(g) in cases not provided for by the former part of this section, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience.

(U.P. Local Acts, by Mohan Lal Kharbanda, 2nd Edn. 1936-37)

12. In Moore's Indian Appeals (1863-1864) 9 MIA 387 The Advocate-General of Bengal on behalf of Her Majesty Vs. Ranee Surnomoye Dossee the Privy Council held that the law applicable to the Hindus prior to acquisition of the rights of sovereignty by the English crown unless altered by express enactment by the Crown those laws remained unchanged and applicable to them. Relevant extract from page 426-427 & 429 of the said judgment reads as follows:

"But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The

question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1944 to Hindoos destroying themselves in *Calcutta*.

We were referred by Mr. *Melvill* in his very able argument, to the Charter of *Charles II*. In 1661, as the first, and indeed the only one which in express terms introduces English law into the East Indies. It gave authority to the Company to appoint Governors of the several places where they had or should have Factories, and it authorized such Governors and their Council to judge all persons belonging to the said Company, or that should live under them, in all causes, whether Civil or Criminal, according to the laws of the Kingdom of *England*, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over native subjects of the *Mogul*, and the Charter was admitted by Mr. *Melvill* (as we understood him) to apply only to the European servants of the Company; at all events it could have no application to the question now under consideration. The English law, Civil and Criminal, has been usually considered to have been made applicable to Natives, within the limits of *Calcutta*, in the year 1726, by the Charter, 13th Geo. I. Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of England to Natives not Christians, to Mahomedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

(9 MIA 426 & 427)

...

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of *Sir Barnes Peacock* in this case; and if it were not so introduced, then as regards Natives, it never had any existence."

(9 MIA 430)

13. In Moore's Indian Appeals (1836-1837) 1 MIA 175 The Mayor of the City of Lyons Vs. the Hon'ble The East India Company and His Majesty's Attorney General the Privy held that a foreign settlement obtained in an inhabited country, it is allowed, that the law of the country continues until the Crown, or the Legislature change it. Relevant extract from page 270-272 of the said judgment reads as follows:

"It is agreed, on all hands, that a Foreign Settlement, obtained in an inhabited Country, by conquest, or by cession from another Power,

stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited Country.

In the later case, it is said, that the subjects of the Crown carry with them the laws of England, there being, of course, no *lex loci*. In the former case, it is allowed, that the law of the Country continues until the Crown, or the Legislature, change it. This distinction, to this extent, is taken in all the Books; it is one of the six propositions, stated in *Campbell v. Hall*, as quite clear; and no matter of controversy in the case. And it had been laid, in *Calvin's case*; in *Dutton v. Howell*; (*Shower, Parl. Ca. 24*) in *Blankard v. Galdy* (Salk 411), by Lord Holt, delivering the judgment of the Court; and nowhere more distinctly, and accurately, than in the decision of this Court (Anon.—2P.Will 75). Two limitations of this proposition are added, to which it may be material that we should attend. One of these refers to conquests, or cessions. In *Calvin's case*, an exception is made of infidel countries; for which, it is said, in *Dutton v. Howell*, that, though Lord Coke gives no authority, yet it must be admitted, as being consonant to reason. But this is treated, in terms, as an “absurdity”, by the Court, in *Campbell v. Hall*; the other limitation refers to new plantations. Mr. Justice Blackstone (1 Bl. Com. 106) says, that only so much of the English law is carried into them, by the settler, as is applicable to their situation, and to the condition of an infant Colony. And Sir William Grant, in *The Attorney-General v. Stewart* (2 Mer 161) applies the same expression, even to the case of conquered or ceded territories, into which the English law of property has been generally introduced. Upon this ground, he held that the Statute of Mortmain does not extend to the Colonies governed by the English law, unless it has been expressly introduced there; because it had its origin in a policy peculiarly adapted to circumstances of the mother Country.”

(1 MIA 175 at p.270-272)

14. Yajnavalkya-Smriti (I/343) lays down that in the acquired country the King should deliver justice according to custom, usage and law of the said conquered country. The said verse of the Yajnavalkya-Smriti as well as Mitatakashara commentary thereon with its Hindi translation are reproduced as follows:-

यस्मिन्देशे य आचारो व्यवहारः कुलस्थितिः।

तथैव परिपाल्योऽसौ यदा वशमुपागतः॥३४३॥

किंच, यदा परदेशो वशमुपागतस्तदा न स्वदेशाचारादिसंकरः काय, किंतु यस्मिन्देशे य आचारः कुल स्थितिव्यवहारो वा यथैव प्रागासीत्तथैवासौ परिपालनीयो यदि शास्त्र विरुद्धो न भवति। यदा वशमुपागतः इत्वेनेन वशोपगमनात्प्रागनियम इति दर्शितम्। यथोक्तम् (मनुः ७/१९५)– उपरुध्यारिमासीत् राष्ट्रं चास्योपपीडयेत्। दूषयेश्चास्य सततं यवसान्नोदकेन्धनम्॥ इति ॥३४३॥

भाषा- अपने वश में आ जावे तो जिस देश में जो आचार, व्यवहार और कुल की मर्यादा हो उसका उसी रूप में वह पालन करे॥३४३॥

PART- X

IN 1526 A.D. WHEN BABUR BECAME RULER OF DELHI, AGRA & OUDH DEFEATING SULTAN IBRAHIM LODI IN THE BATTLE OF PANIPAT THESE TERRITORIES WERE COMPRISED IN DAR-UL-ISLAM:

1. When in the year 1526 King Babur acquired sovereignty over Delhi, Agra and Oudh defeating Sultan Ibrahim Lodi In the battle of Panipat those territories were constituent of 'Dar-ul-Islam for the reason that outgoing Sultan was a Muslim and during his reign Law of Shar was Law of the Land. Therefore by defeating Sultan Ibrahim Lodi Emperor Babur acquired only those right of Sovereignty that a Islamic ruler had under Shar and; as Shar does not extinguish title of land owner on the basis of change of sovereignty or religion of the subjects he didn't become owner of the land owned by his Hindu subjects and their endowments. As a Hindu Endowment Ramajanamsthan Temple was already existing, Emperor Babur did not acquire ownership of that place as such alleged creation of Wakf for erection of Masjid thereon rendered the said alleged Wakf null and void.
2. Illustrated author and great jurist Syed Ameer Ali in his book the 'Spirit of Islam' (at p.215) describes the relationship between the citizens of three types of Nations Dar-ul-Islam i.e. an Islamic State, Dar-ul-Harb i.e. a State Ruled by belligerent *non-Islamic* Ruler, Dar-ul-Aman. i.e. a State Ruled by *non-Islamic* Ruler with which an Islamic State is at peace. Relevant extract of the said book reads as follows:

“An examination, however, of the principles upon which the relations of Moslem states with non-Moslem countries were based, shows a far greater degree of liberality than has been evinced by Christian writers on international law. It is only in recent times, and under stress of circumstances that non-Christian states have been admitted into the “comity of nations”. The Moslem jurists, on the other hand, differentiate between the condition of belligerency and that of peace. The expression, Dar-ul-Harb thus includes countries with which the Moslems are at war; whilst the States with which they are at peace are the Dar-ul-Aman. The harbi, the inhabitants of the Dar-ul-harb, is an alien, pure and simple. He has no right to enter Islamic States without express permission. But once he receives the aman or guarantee of safety from even the poorest Moslem, he is perfectly secure from molestation for the space of one year. On the expiration of that period, he is bound to depart. The inhabitant of the *Dar-ul-aman* is a *mustamin*. The *aman* may be for ever or for a limited duration, but so long as it lasts, the *mustamin's* treatment is regulated in strict accordance with the terms of the treaty with his country. The *mustamins* were governed by their own laws, were exempt from taxation and enjoyed other privileges.

The spirit of aggression never breathed itself into that code which formally incorporated the Law of Nations with the religion; and the followers of Mohammed, in the plentitude of their power, were always ready to say to their enemies, ‘Cease all hostility to us, and be our allies, and we shall be faithful to you; or pay tribute and we will secure

and protect you in all your rights; or adopt our religion, and you shall enjoy every privilege we ourselves possess."

(Spirit of Islam by Syed Ameer Ali at p.215)

3. Syed Ameer Ali in his book 'Commentaries on Mahommedan Law' also describes Dar-ul-Harb. Relevant extract from the foot note 1 of the said book reads as follows:

"The Moslem jurists, like the jurists of Christendom, until very recent times, divided the world into two portions, one the *Dar ul-Harb*, and the other the *Dar ul-Islam*, the country of peace. Juridically, all Mussulman nations were at peace with each other. As a matter of fact, no *Mussulman* Sovereign could declare war against another without first pronouncing him to be a heretic and beyond the pale of Islam. The non-Moslem subjects of Moslem States are called *Zimmis*. The non-Moslem subjects of non-Moslem Sovereigns at peace with Islamic States are called *Mustamins*.

(Mahommedan Law by Syed Ameer Ali, 5th Edn. Reprint 2009, published by Hind Publishing House, Allahabad, p.301)

4. Fighting between two Muslim Rulers is not fighting between Dar-ul-Islam and Dar-ul-Herb but it is fighting between to armies of Islam for Superiority for the benefit of Islam and subject people. This is very much apparent from the extract quotted in the preceding paragraph from Syed Amir Ali's book as also, from the answer given by Sultan Sikandar Lodi to the *Kalandar* (i.e. a person who had no worldly desires). When said *Darvesh* conveyed the Sultan that he would attain victory in ongoing battle, the Sultan told him that when two Islamic armies are fighting decision should not be given in one's favour but only good wishes should be given stating that who will be beneficial for Islam and subject people will attain victory. Relevant extract from the book *Tabkati-Akbari* published in the Book *Uttar Taimoorkalin Bharat* at page 227 reads as follows:

सुल्तान का क़लन्दर को उत्तर

कहा जाता है कि एक दिन जब वह अपने भाई बारबक शाह से युद्ध कर रहा था तो युद्ध के समय एक क़लन्दर दृष्टिगत हुआ और उसका हाथ पकड़ कर उसने कहा "तेरी विजय है।" सुल्तान ने घृणा से अपना हाथ खींच लिया। दरवेश ने कहा कि, "मैं सुखद समाचार कहता हूँ और तुझे विजय की सूचना दे रहा हूँ। किन्तु तू अपना हाथ किस कारण खींच रहा है?" उसने उत्तर दिया, "जब दो मुसलमान सेनाओं में युद्ध हो रहा हो तो एक के विषय में निर्णय न देना चाहिए अपितु यह कहना चाहिए कि जिससे इस्लाम का भला हो और जिससे प्रजा की उन्नति हो, उसे विजय हो और ईश्वर से यही शुभ कामना करनी चाहिए।"

PART- XI

TRANSGRESSION OF DIVINE LAW OF SHAR BY AN ISLAMIC RULER AS WELL AS MUSLIMS IS IMPERMISSIBILITY IN DAR-UL-ISLAM:

1. Muslims are not free to lead the life of their choice and they are bound by the law of Shar. Muslims should not transgress law as enunciated in Shar otherwise they will lose their status of being Muslim. According to *Shar* Plunderer & looters are not Muslims. Islamic Ruler and Muslims are subject to Divine Law of *Shar* according to which *duty* of an Islamic Ruler is to guard the lives, honour and property of his subjects, maintain peace, check the evil-doer, and prevent injuries and; duty of Muslims is to disobey oppressive and sinful order of a Tyrant Ruler and refrain himself from such sinful acts. Muslims should not approve bad deed of the Amirs i.e. the rulers. Making a just statement before tyrannical ruler is a greatest type of *Jihad*. A person who acts as guard against the unlawful, is kind to his neighbour and loves the people as he loves himself is Muslim, otherwise not.

2. The Sacred Compilation Jami' At-Tirmidhi (Vol.-III) Hadith 1601 reveals that plundering and looting the property of others is an open violation of Islamic Law. Said Hadith reads as follows:

"1601. Anas narrated that the Messenger of Allah said: "Whoever plunders then he is not of us." (*Sahih*)

...

Comments:

Plundering and looting the property of others is an open violation of Islamic Law and against the basic concept of brotherhood in Islam, therefore, according to the words used in this narration "He is not from us."

3. The Sacred Compilation Hadith Sahih Bukhari 8.763 reveals that the Holy Prophet said that at the time of commission of prohibited acts such as theft, robbery, drinking etc. a Muslim becomes non-Muslims. Said Hadith reads as follows:

8.763:

Narrated Abu Huraira: Allah's Apostle said, "When an adulterer commits illegal sexual intercourse, then he is not a believer at the time he is doing it; and when somebody drinks an alcoholic drink, then he is not a believer at the time of drinking, and when a thief steals, he is not a believer at the time when he is stealing; and when a robber robs and the people look at him, then he is not a believer at the time of doing it." Abu Huraira in another narration, narrated the same from the Prophet with the exclusion of robbery.

4. The great Jurist & illustrated writer Syed Ameer Ali in his book 'Spirit of Islam' (at p.288-89) records duties of sovereigns of Islamic Nation towards their subjects as follows:

"The importance which Islam attaches to the duties of the sovereigns towards their subjects, and the manner in which it promotes the freedom

and equality of the people and protects them against the oppression of their rulers, is shown in a remarkable work on the reciprocal rights of sovereigns and subjects by Safi-ud-din Mohammed bin Ali bin Taba Taba, commonly known as Ibn ut-Tiktaka. The book was composed in 701 A.H. (1301-2) and is dedicated to fakhr ud-ain Isa bin Ibrahim, Ameer of Mosul.

The first part deals with the duties of sovereigns to their subjects and the rules for the administration of public affairs and political economy. The author describes the qualities essential for a sovereign—wisdom, justice, knowledge of the wants and wishes of his people, and the fear of God; and adds emphatically that this latter quality is the root of all good, and the key to all blessings, “for when the king is conscious of the presence of God, His servants will enjoy the blessings of peace and security.” The sovereign must also possess the quality of mercy, and “this is the greatest of all good qualities”. He must have an ever-present desire to benefit his subjects, and consult with them on their wants, for the Prophet consulted always with his companions, and God hath said “Council with them on every affair”. In the administration of public affairs, it is the sovereign’s duty to superintend the public income, guard the lives and property of his subjects, maintain peace, check the evil-doer, prevent injuries. He must always keep his word, and then, adds the author significantly, “the duty of the subject is obedience, but no subject is bound to obey a tyrant.” Ibn rushd (the great Averroes) says, “the tyrant is he who governs for himself, and not for his people.”

(Spirit of Islam by Syed Ameer Ali at p.288-89)

5. The Sacred Compilation Hadith Sahih Muslim (Vol.-I) 142 & 142R1 reveal that the Holy Prophet commanded that ruler must be honest in his dealing with those over whom he rules otherwise the ruler is cheater. Commentator explains that the Hadiths says that it is duty of the ruler to see that the life and honour of the subject people are protected and to ensure just social, political and economic system. Said Hadith as well as comments thereon read as follows:

[142] Hasan reported: Ubaidullah b. Ziyad paid a visit to Ma'qil b. Yasir Muzani in his illness which caused his death. Ma'qul said: I am going to narrate to you a hadith which I have heard from the Messenger of Allah (SAW) and which I would not have transmitted if I knew that I would survive. Verily I have heard the Messenger of Allah (SAW) saying: There is no one amongst the bondsmen who was entrusted with the affairs of his subjects and he died in such a state that he was dishonest in his dealing with those over whom he ruled that the Paradise is not forbidden for him.

[142R1] Hasan reported: 'Ubaidullah b. Ziyad went to see Ma'quill b. Yasir and he was in agony. He ('Ubaidullah) inquired (about the health) to which he (Ma'quill) replied: I am narrating to you a hadith which I avoided narrating to you (before). Verily the Messenger of Allah (SAW) said: Allah does not entrust to his bondsman the responsibility of managing the affairs of his subjects and he dies as a cheater (ruler) but Paradise is forbidden but Allah for such a (ruler). He (Ibn Ziyad) said: Why did you not narrate it to me before this day ? He replied : I (in fact) did not narrate it to you as it was not (fit) for me to narrate that to you.

(3) Islam exhorts its followers to create a kingdom of heaven in their hearts but this kingdom of heart must be externalized in a just social, political and economic system. The ruler and the state have thus important responsibilities to shoulder. It is the bounden duty of the ruler to see that he acquits himself creditably of the responsibilities saddled on him. He should see that the life and honour of the people are protected. He should also see that no one falls victim to the high-handedness of another.

6. The Sacred Compilation Hadith Sahih Muslim (Vol.-III) 1827-1829 reveal that Holy Prophet said that the ruler is a shepherd over the people and shall be questioned about his subjects as to how he conducted their affairs and if he is hard upon them, the Almighty will be hard upon him. Said Hadiths read as follows:

[1827] It has been narrated on the authority of 'Abdullah b. 'Umar that the Messenger of Allah (may peace be upon him) said: Behold! the Dispensers of Justice will be seated on the pulpits of light beside God, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. (The Dispensers of Justice are) those who do justice in their rules, in matters relating to their families and in all that they undertake to do.

[1828] It has been reported on the authority of 'Abdel-Rahman b. Shumasa who said: I came to 'A'isha to inquire something from her. She said: From which people art thou? I said: I am from the people of Egypt. She said: What was the behavior of your governor towards you in this war of yours? I said: We did not experience anything bad from him. If the camel of a man from us died, he would bestow on him a camel. If any one of us lost his slave, he would give him a slave. If anybody was in need of the basic necessities of life, he would provide them with provisions. She said: Behold! the treatment that was meted out to my brother, Muhammad b. Abu Bark, does not prevent me from telling you what I heard from the Messenger of Allah (may peace be upon him). He said in this house of mine: O God, who (happens to) acquire some kind of control over the affairs of my people and is hard upon them – be Thou hard upon him, and who (happens to) acquire some kind of control over the affairs of my people and is kind to them – be Thou kind to him.

[1828R1] This hadith has been narrated on the authority of 'Abdel-Rah-man b. Shumasa with another chain of transmitters.

[1829] It has been narrated on the authority of Ibn 'Umar that the Holy Prophet (may peace be upon him) said: Beware, every one of you is a shepherd and every one is answerable with regard to this flock. The Caliph is a shepherd over the people and shall be questioned about his subjects (as to how he conducted their affairs). A man is a guardian over the members of his family and shall be questioned about them (as to how he looked after their physical and moral well-being). A woman is a guardian over the household of her husband and his children and shall be questioned about them (as to how she managed the household and brought up the children). A slave is a guardian over the property of his master and shall be questioned about it (as to how he safeguarded his trust). Beware, every one of you is a guardian and every one of you shall be questioned with regard to his trust.

7. The Sacred Compilation Hadith Sahih Muslim (Vol.-III) 1839, 1840R1 reveal that Holy Prophet commanded the Muslims not to do a sin and if he is ordered to do a sinful act by the commander, a Muslim should neither listen to him nor should he obey his orders. The said Hadiths read as follows:

[1839] It has been narrated on the authority of Ibn 'Umar that the Holy Prophet (may peace be upon him) said: it is obligatory on a Muslim that he should listen (to the ruler appointed over him) and obey him whether he likes it or not, except that he is ordered to do a sin. If he is ordered to do a sinful act, a Muslim should neither listen to him nor should he obey his orders.

[1840R1] It has been narrated on the authority of 'Ali who said: The Messenger of Allah (may peace be upon him) sent an expedition and appointed over the Mujahids a man from the Ansar. (While making the appointment), he ordered that his word should be listened to and obeyed. They made him angry in a matter. He said: Collect for me dry wood. They collected it for him. Then he said: Kindle a fire. They kindled (the fire). Then he said: Didn't the Messenger of Allah (may peace be upon him) order you to listen to me and obey (my orders)? They said: Yes. He said: Enter the fire. The narrator says: (At this), they began to look at one another and said: We fled from the fire to (find refuge with) the Messenger of Allah (may peace be upon him) (and now you order us to enter it). They stood quiet until his anger cooled down and the fire went out. When they returned, they related the incident to the Messenger of Allah (may peace be upon him). He said: If they had entered it, they would not have come out. Obedience (to the commander) is obligatory only in what is good.

8. The Sacred Compilation Hadith Sahih Muslim (Vol.-III) 1854 & 1854R1 reveal that the Holy Prophet has commanded that Muslims should not approve bad deed of the Amirs i.e. the rulers. Said Hadith reads as follows:

[1854] It has been narrated on the authority of Umm Salama that the Messenger of Allah (may peace be upon him) said: In the near future there will be Amirs and you will like their good deeds and dislike their bad deeds. One who sees their bad deeds (and tries to prevent their repetition by his hand or through his speech), is absolved from blame, but one who hates their bad deeds (in the heat of his heart, being unable to prevent their recurrence by his hand or his tongue), is (also) safe (as far as God's wrath is concerned). But one who approves their bad deeds and imitates them is spiritually ruined. People asked (the Holy Prophet); Shouldn't we fight against them ? He replied : No, as long as they say their prayers.

[1854R1] It has been narrated (through a different chain of transmitters) on the authority of Umm Salama (wife of the Holy Prophet) that he said: The Amirs will be appointed over you, and you will find them doing good as well as bad deeds. One who hates their bad deeds is absolved from blame. One who disapproves their bad deeds is (also) safe (as far as Divine wrath is concerned). But one who approves their bad deeds and imitates them (is doomed). People asked: Messenger of Allah, shouldn't we fight against them ? He replied: No, as long as they say their prayers. (>>Hating and disapproving<< refers to liking and disliking from the heart.)

9. The Sacred Compilation Hadith Sahih Muslim (Vol.-III) 1855R1 reveals that the Holy Prophet has commanded the Muslims to condemn such act of their rulers which is an act of disobedience to God i.e. the Holy ordinances of the Allah and his Holy Messenger. Said Hadith reads as follows:

[1855R1] It has been narrated on the authority of 'Abu b.Malik Al-Ash-ja'I who said that he heard the Messenger of Allah (may peace be upon him) saying: The best of your rulers are those whom you love and who love you, upon whom you invoke God's blessings and who invoke His blessings upon you. And the worst of your rulers are those whom you hate and who hate you, who curse you and whom you curse. (Those present) said: Shouldn't we overthrow them at this? He said: No, as long as they establish prayer among you. No, as long as they establish prayer among you. Mind you! One who has a governor appointed over him and he finds that the governor indulges in an act of disobedience to God, he should condemn the governor's act, in disobedience to God, but should not withdraw himself from his obedience.

10. The Sacred Compilation Jami' At-Tirmidhi (Vol.-4) Hadith 2174 reveals that the Holy Prophet said that making a just statement before tyrannical ruler is a greatest type of *Jihad*. Said Hadith reads as follows:

"2174. Abu Sa'eed Al-Khudri narrated that the Prophet said: 'Indeed, among the greatest types of *Jihad* is a just statement before a tyrannical ruler.' **(Hasan)**

From the said Hadith it is crystal clear that greatest *Jihad* would be to curse action of a tyrant ruler converting a temple into mosque in flagrant violation of Divine commands of *Shar*.

11. The Sacred Compilation Hadith Sahih Bukhari 3.627-629 reveal that the Holy Prophet has strictly commanded to avoid oppression. Said Hadiths read as follows:

3.627:

Narrated Ibn 'Umar: The Prophet said, "Oppression will be a darkness on the Day of Resurrection."

3.628:

Narrated Ibn 'Abbas: The Prophet sent Mu'adh to Yemen and said, "Be afraid, from the curse of the oppressed as there is no screen between his invocation and Allah."

3.629:

Narrated Abu Huraira: Allah's Apostle said, "Whoever has oppressed another person concerning his reputation or anything else, he should beg him to forgive him before the Day of Resurrection when there will be no money (to compensate for

wrong deeds), but if he has good deeds, those good deeds will be taken from him according to his oppression which he has done, and if he has no good deeds, the sins of the oppressed person will be loaded on him."

12. The Sacred Compilation Jami' At-Tirmidhi (Vol.-4) Hadith 2030 reveals that the Holy Prophet has cursed oppression. Said Hadith reads as follows

"2030. Ibn 'Umar narrated that the Prophet said: 'Oppression shall be darkness on the Day of Judgment.' **(Sahih)**

Comments:

Tyranny and oppression in this world shall be required by darkness and doom on the Day of Judgment to which the Quran refers when Allah rhetorically poses the question: "Who rescues you from the darkness of the land and the sea?"

13. The Sacred Compilation Jami' At-Tirmidhi (Vol.-4) Hadith 2324 reveals that the Holy Prophet has said that this world is a prison for Muslims and as the prisoner is not free to lead the life of his choice and is bound by the law of the prison and the whims of its officers in the similar manner Muslims are also not free to lead life of their choice and they are bound by the law of *Shar*. Said Hadith as well as the comment thereto read as follows:

“2324. Abu Hurairah narrated that the Messenger of Allah said: “The world is a prison for the believer and Paradise for the disbeliever. **(Sahih)**

Comments:

The main characteristic of a prison is that the prisoner in it is not free to lead a life of his choice, but is bound by the laws of the prison and the whims of its officers. He is neither free in eating and drinking, nor in sleeping and awakening, nor in moving about nor in meeting with the people at will. In short, he has no freedom of any kind in a prison house, and has willy-nilly to obey the orders of others. The second thing is that no prisoner loves his prison like home, but is always on the lookout to somehow get rid of it. Paradise, on the other hand, is a place where the inhabitants will have no such restrictions. Each person will live a life of his choice, and every desire of his will be fulfilled and he will never feel the desire to get out of it.”

14. The Sacred Compilation Jami‘ At-Tirmidhi (Vol.-5) Hadith 2683 reveals that the Holy Prophet has directed the Muslims to refrain from any kind of major and minor sins. Said Hadith and comment thereto read as follows:

“2683. Ibn Ashwa narrated from Yazid bin Salamah Al-Ju ‘fi, he said: ‘Yazid bin Salamah said: ‘O Messenger of Allah! I heard so many narrations from you that I am afraid the last of them will cause me to forget the first of them. So narrate a statement to me that will encompass them.’ So he said: “Have *Taqwa* of Allah with what you learn.” **(Da‘if)**

Comments:

The extract and a full outcome of the whole religion is *Taqwa*, for this objective the Prophets, Messengers and the Books were sent; and *Taqwa* is to refrain from any kind of major and minor sins, it big and small.”

15. The Sacred Compilation Jami‘ At-Tirmidhi (Vol.-5) Hadith 2687 reveals that the Holy Prophet has commanded the Muslims to accept everything that is good and perfect setting aside the worldly benefits, objectives and lusts. Said Hadith and comments thereto read as follows:

“2687. Abu Hurairah narrated that the Messenger of Allah said: “The wise statement is the lost property of the believer, so wherever he finds it, then he is more worthy of it. **(Da‘if)**

Comments:

In the creation and nature of human, the passion of obedience and submission is planted, which is the origin and source of every good and righteousness, but because of worldly benefits, objectives and lusts it becomes neglectful of good and righteousness, whereas the demand of its nature and habit is to accept everything that is good and perfect.”

16. The Sacred Compilation Jami‘ At-Tirmidhi (Vol.-5) Hadith 2826 reveals that if there is anyone to whom the Holy Prophet has made a promise it must be complied by the Rulers. Said Hadith read as follows:

“2826. Isma‘l bin Abi Khalid narrated that Abu Juhaifah said: “I saw the Messenger of Allah (he was) white and turning grey. Al Hasan bin

'Ali resembles him most. He had promised thirteen young she-camels for us, so we went to get them. When we arrived he had died without giving us anything. So, when Abu Bakr (became the *Khalifah*) he said 'If there is anyone to whom the Messenger of Allah made a promise, then let him come forth.' I stood to inform him about it, and he ordered that they be given to us." (**Sahih**)

17. The Muwatta' Imam Malik 959 and 960 reveal that the Muslims should neither break vows nor kill disbelievers breaking promise of protection given to him. Said Muwatta nos. 959 & 960 read as follows:

(959) It reached Malik that 'Umar b. 'Abd al-'Aziz wrote to one of his administrators : We have learnt that whenever the Messenger of Allah (may peace of upon him) sent out force, he used to command them: Fight taking the name of the Lord. You are fighting in the cause of the Lord with people who have disbelieved and rejected the Lord; do not commit theft, do not break vows; do not cut ears and noses, do not kill women and children. Communicate this to your armies. If God wills ! Peace be on you.

(960) A man of Kufah reported that 'Umar b. al-Khattab wrote to a commander of the army: I have received information that some of you call an unbeliever when he mounts a hillock and gives up fighting, and ask him not to fear and then, getting the opportunity, kill him. I swear by Him Who is the Master of my life, if I should learn anyone doing so, I shall behead him.

18. The Sacred Compilation Jami' At-Tirmidhi (Vol.-4) Hadith 2305 reveals that the Holy Prophet has said that a person who acts as guard against the unlawful, is kind to his neighbour and loves the people as he loves himself is Muslim, otherwise not. The said Hadith reads as follows:

"2305. Al-Hasan narrated from Abu Hurairah that the Messenger of Allah said: "Who will take these statements from me, so that he may act upon them, or teach one who will act upon them?" So Abu Hurairah said: "I shall O Messenger of Allah! So he took my hand and enumerated five (things), he said: "Be on guard against the unlawful and you shall be the most worshipping among the people, be satisfied with what Allah has allotted for you and you shall be the richest of the people, be kind to your neighbor and you shall be a believer, love for the people what you love for yourself and you shall be a Muslim. And do not laugh too much, for indeed increased laughter kills the heart."
(**Da'if**)

As such a person who laid down foundation of his building on hatred was not a Muslim and the structure alleged to be erected by him was not a mosque.

19. The Sacred Compilation Jami' At-Tirmidhi (Vol.-4) Hadith 1987 reveals that the Holy Prophet has commanded the Muslims to follow an evil deed with a good one to wipe it out and treat the people with good behavior . Said Hadith reads as follows:

"1987. Abu Dharr said: "the Messenger of Allah said to me: 'Have *Taqwa* of Allah wherever you are, and follow an evil deed with a good one to wipe it out, and treat the people with good behavior." (**Hasan**)

PART -XII

LAW OF ADVERSE POSSESSION IS NOT RECOGNISED BY SHAR AND ALIEN TO IT AS SUCH SEEKING DECLARATION OF A STRUCTURE BUILT OVER THE RELIGIOUS PLACE OF THE HINDUS AS A MOSQUE ON GROUND OF ADVERSE POSSESSION IS FLAGRANT VIOLATION OF ISLAMIC LAW AS SUCH SUIT IS LIABLE TO BE DISMISSED:

1. The law of *Shar* does not recognize adverse possession but recognizes right of Jimmis to own landed property subject to payment of Jeziah (protection Tax) and, it makes some special provisions to debar the Muslims from acquiring the lands of Jimmis. Usurping land of lawful owner is prohibited in *Shar*. *Shar* does not permit adverse possession rather says that it is gravest sin. As Sultan Ibrahim Lodi was not title holder of Sri Ramajanamsthan Temple of the then Jimmis i.e. Hindus, Emperor Babur did not acquire Title of said Temple-land by defeating him, as such any building erected over the Temple-Land of the Hindus by Emperor Babur cannot be construed as Masjid and the plaintiffs cannot claim Ownership invoking law of Adverse Possession and Limitation as this branch of law is totally alien to *Shar*. Law of Adverse Possession came in existence only on enactment of 1st Limitation Act by the British Parliament after acquisition of Sovereignty over India by the British Government vide Queen Victoria's 1858 Declaration who was ultimately declared Empress of India in 1876.
2. The Gazetteer of India Vol.-II, (3rd Edn. 1990, published by Publication Division) at page 375-376 records the facts from which it becomes crystal clear that during the Sultanate and Mughal Period Hindus were owner of landed property and paying Jizyah thereon. Purchase of land of Hindus by the Muslims was prohibited and was illegal. Relevant extract from the said book reads as follows:

The chief source of income of the state was land revenue. Under the Sultans, this came to be known as Kharaj. The term originally signified all taxes including jizyah raised from the non-Muslims, who were called kharaj guzars. The amount of land revenue was raised from the earlier one-sixth or less to at least one-third of the gross produce. This was further raised by 'Alau'd-din Khalji to the maximum legal limit of one half or 50 per cent of the gross produce. After his death, this practice was discontinued and the original incidence of the state share was restored. On lands held by Muslims, 'ushrah or one-tenth only was levied in the beginning. However, if 'ushrl land was purchased by a non-Muslim, it became kharaji. Later, kharaji lands, even when acquired by Muslims were ordered to remain kharaji because their conversion to ushrah involved much loss of revenue to the state.

Other sources of income were jizyah , a sort of capitation tax levied upon every adult Hindu male with independent means of maintenance; zakat, a tax raised from well-to-do Muslims for the sake of helping needy Muslims, khams or ghanlniah, the booty taken in war; transit and octroi duties, mines, forests, treasure trove (dafinah) and heirless property. The jizyah was a means of inflicting on the Hindu dhimmi not only a financial burden but also a sense of humiliation.

3. In his book *Tarikh-I-Salatin-I-Afaghana*, Ahmad Yadgar records that Emperor Babur gifted revenues of one harvest to Sultan Muhammad Aughulf who had helped him in the battle of Panipath against Sultan Ibrahim Lodi. From the

said recording it becomes crystal clear that the land was owned by the land-holders and ruler was entitled only for land revenue. Relevant extract of the said book [compiled in Volume 5 of the book, History of India as told by its own historians, translated by Sir H. M. Elliot first published in 1867-1877 reprinted in 2008 by Low Price Publication at page 34] reads as follows:

Historians relate that in the year 932 (1526 A.D.), Shah Babar, the Conqueror of the World, remained encamped for a week on the battle-field on which he had gained his victory, and made himself master of all the property, elephants, equipages, war like implements, etc., of Sultan Ibrahim. He considered that that spot had been a fortunate one to him. He summoned the elders of the city, and gained the goodwill of all by his liberality; and made Sultan Muhammad Aughul, who had come to his assistance during that action with great diligence and bravery accompanied by 10000 horse, governor of Panipat, and granted him as a gift the revenues due upon one harvest.

4. Mahomed Kasim Ferishta in his book Tarikhe Feristha (English translation of John Briggs's titled as History of rise of the Mahommedan Power in India, Vol.-II at page 29) writes that:

"So great, however, was the terror inspired by the Moguls, that the Rajpoots proposed to capitulate; and in lieu of any other ransom for the private property of individuals, Babur was content to receive a diamond."

5. An illustrated author and great jurist Syed Ameer Ali in his book the 'Spirit of Islam' at page 274 quoting authority substantiate that in the eye of law of *Shar* the Muslims and Jimmis were absolutely equal and neither the Imam nor the Sultan had right to dispossess a Jimmi of his property. To avoid high-handedness, no Muslim was allowed to acquire the land of Jimmis even by purchase. The relevant extract from the said book reads as follows:

"In order to avoid the least semblance of high-handedness, no Moslem was allowed to acquire the land of a zimmi even by purchase. "Neither the Imam nor the Sultan" could dispossess a zimmi of his property.

The Moslems and the zimmis were absolutely equal in the eye of the law. "Their blood", said Ali the Caliph, "was like our blood."

6. The Sacred Compilation Hadith Shahi Bukhari 3.599 reveals that there was a dispute of title in respect of landed property in between a Jew and Muslim wherein the Holy Prophet decided the title in favour of the Jew from which fact it is crystal clear that right of private property was a recognized right by the Holy Prophet. The said Hadith reads as follows:

3.599:

Narrated 'Abdullah bin Mas'ud: Allah's Apostle said, "Whovertakes a false oath so as to take the property of a Muslim (illegally) will meet Allah while He will be angry with him." Al'Ash'ath said: By Allah, that saying concerned me. I had common land with a Jew, and the Jew later on denied my ownership, so I took him to the Prophet who asked me whether I had a proof of my ownership. When I replied in the

negative, the Prophet asked the Jew to take an oath. I said, "O Allah's Apostle! He will take an oath and deprive me of my property." So, Allah revealed the following verse: "Verily! Those who purchase a little gain at the cost of Allah's covenant and their oaths."

7. The Sacred Compilation Hadith Shahi Bukhari 2.528 reveals that the Holy Prophet and Caliph Umar recognized the cultivator of the land as its original owner. Said Hadith reads as follows:

2.528:

Narrated Anas:

Abu Bakr wrote to me what Allah had instructed His Apostle (p.b.u.h) to do regarding the one who had to pay one Bint Makhad (i.e. one year"old she"camel) as Zakat, and he did not have it but had got Bint Labun (two year old she"camel). (He wrote that) it could be accepted from him as Zakat, and the collector of Zakat would return him 20 Dirhams or two sheep; and if the Zakat payer had not a Bint Makhad, but he had Ibn

Labun (a two year old he"camel) then it could be accepted as his Zakat, but he would not be paid anything .

8. The Sacred Compilation Hadith Shahi Bukhari 5.542, 5.543 and 3.354 reveal that the conquered land were made revenue paying land i.e. a source of common treasury. From this Hadith it becomes crystal clear that the right to own land by the subject people of the conquered country was recognized subject to payment of revenue. Said Hadiths read as follows:

5.542:

Narrated 'Umar bin Al'Khattab: By Him in Whose Hand my soul is, were I not afraid that the other Muslims might be left in poverty, I would divide (the land of) whatever village I may conquer (among the fighters), as the Prophet divided the land of Khaibar. But I prefer to leave it as a (source of) a common treasury for them to distribute it revenue amongst themselves.

5.543:

Narrated 'Umar:

But for the other Muslims (i.e. coming generations) I would divide (the land of) whatever villages the Muslims might conquer (among the fighters), as the Prophet divided (the land of) Khaibar.

9. The Sacred Compilation Hadith Shahi Bukhari 9.447 reveal that even the right to own land of the enemy was also recognized and before expelling the Jews from Bait-al-Midras, the Holy Prophet gave them option to sell their property before leaving the land. Said Hadith reads as follows:

9.447:

Narrated Abu Huraira: While we were in the mosque, Allah's Apostle came out and said, "Let us proceed to the Jews." So we went out with him till we came to Bait'al"Midras. The Prophet stood up there and called them, saying, "O assembly of Jews! Surrender to Allah (embrace

Islam) and you will be safe!" They said, "You have conveyed Allah's message, O Aba'al-Qasim" Allah's Apostle then said to them, "That is what I want; embrace Islam and you will be safe." They said, "You have conveyed the message, O Aba'al-Qasim." Allah's Apostle then said to them, "That is what I want," and repeated his words for the third time and added, "Know that the earth is for Allah and I want to exile you from this land, so whoever among you has property he should sell it, otherwise, know that the land is for Allah and His Apostle."

10. The Sacred Compilation Hadith Shahi Bukhari 3.890 reveals that before expelling the Jews from Khaibar, the Caliph Umar gave them price of their landed property. Said Hadith reads as follows:

3.890:

Narrated Ibn 'Umar: When the people of Khaibar dislocated 'Abdullah bin 'Umar's hands and feet, 'Umar got up delivering a sermon saying, "No doubt, Allah's Apostle made a contract with the Jews concerning their properties, and said to them, 'We allow you (to stand in your land) as long as Allah allows you.' Now 'Abdullah bin 'Umar went to his land and was attacked at night, and his hands and feet were dislocated, and as we have no enemies there except those Jews, they are our enemies and the only people whom we suspect, I have made up my mind to exile them." When 'Umar decided to carry out his decision, a son of Abu Al-Haqiq's came and addressed 'Umar, "O chief of the believers, will you exile us although Muhammad allowed us to stay at our places, and made a contract with us about our properties, and accepted the condition of our residence in our land?" 'Umar said, "Do you think that I have forgotten the statement of Allah's Apostle, i.e.: What will your condition be when you are expelled from Khaibar and your camel will be carrying you night after night?" The Jew replied, "That was joke from Abul-Qasim." 'Umar said, "O the enemy of Allah! You are telling a lie." 'Umar then drove them out and paid them the price of their properties in the form of fruits, money, camel saddles and ropes, etc."

11. The Sacred Compilation Hadith Shahi Bukhari 3.632, 3.633, 3.634, 4.417 and 4.418 as well as the Sacred Compilation Hadith Sahih Muslim (Vol.-III) 1610, 1610R1, 1610R2, 1610R3, 1611 and 1612 reveal that the Holy Prophet strictly prohibited usurpation of land of others. The said Hadiths read as follows:

3.632:

Narrated Sa'id bin Zaid: Allah's Apostle said, "Whoever usurps the land of somebody unjustly, his neck will be encircled with it down the seven earths (on the Day of Resurrection)."

3.633:

Narrated Abu Salama: That there was a dispute between him and some people (about a piece of land). When he told 'Aisha about it, she said, "O Abu Salama! Avoid taking the land unjustly, for the Prophet said, 'Whoever usurps even one span of the land of somebody, his neck will be encircled with it down the seven earths.'"

3.634:

Narrated Salim's father (i.e. 'Abdullah): The Prophet said, "Whoever takes a piece of the land of others unjustly, he will sink down the seven earths on the Day of Resurrection."

4.417:

Narrated Muhammad bin Ibrahim bin Al-Harith: from Abu Salama bin 'Abdur-Rahman who had a dispute with some people on a piece of land, and so he went to 'Aisha and told her about it. She said, "O Abu Salama, avoid the land, for Allah's Apostle said, 'Any person who takes even a span of land unjustly, his neck shall be encircled with it down seven earths.'"

4.418:

Narrated Salim's father: The Prophet said, "Any person who takes a piece of land unjustly will sink down the seven earths on the Day of Resurrection."

[1610] Sa'id b. Zaid b. Amr b. Nufail (Allah be pleased with them) reported that Allah's Messenger (SAW) had said: He who wrongly took a span of land, Allah shall make him carry around his neck seven earths.

[1610R1] Sa'id b. Zaid b. 'Amr b. Nufail (Allah be pleased with them) reported that Arwa (bind Uwais) disputed with him (about a part of the land) of his house. He said: Leave it and take off your claim from it, for I heard Allah's Messenger (SAW) saying: He took a span of land without his right would be made to wear around his neck seven earth on the day of Resurrection. He (Sa'id b. Zaid) said: O Allah, make her blind if she has told a lie and make her grave, in her house. He (the narrator) said: I saw her blind groping (her way) but touching the walls and saying: The curse of Sa'id b. Zaid has hit me. And it so happened that as she was walking in her house, she passed by a well in her house and fell therein and that became her grave.

[1610R2] Hisham b. 'Urwa reported on the authority of his father (Allah be pleased with him) that Arwa bint Uwais disputed with Sa'id b. Zaid that he had seized some of the land belonging to her. She brought this dispute before Marwan b. Al-Hakam. Sa'id said: How could I take a part of her land, after what I heard from Allah's Messenger (SAW)? He (Marwan) said: what did you hear from Allah's Messenger (SAW)? He said: I heard Allah's Messenger (SAW) saying: He who wrongly took a span of land would be made to wear around his neck seven earths. Marwan said: I do not ask any evidence from you after this. He (Sa'id) said: O Allah, make her blind if she has told a lie and kill her in her own land. He (the narrator) said: She did not die until she had lost her eyesight, and (one day) as she was walking in her land, she fell down into a pit and died.

[1610R3] Sa'id b. Zaid reported: I heard Allah's Apostle (SAW) saying: He who took a span of earth wrongly would be made to wear around his neck seven earths on the day of Resurrection.

[1611] Abu Huraira (Allah be pleased with him) reported that Allah's Messenger (SAW) had said: One should not take a span of land without a legitimate right to it, otherwise Allah would make him wear (around his neck) seven earths on the day of Resurrection.

[1612] Muhammad b. Ibrahim said that Abu Salama reported to him that there was between him and his people a dispute over a piece of land, and he came to A'isha and mentioned that to her, whereupon she said: Abu Salama, abstain from getting this land, for Allah's Messenger (SAW) said: He who usurps even a span of land would be made to wear around his neck seven earths.

12. The Sacred Compilation Hadith Sahih Bukhari 8.756 reveals that the Holy Prophet has laid down that a Muslim cannot be heir of follower of other religion nor follower of other religion of a Muslim. The said Hadith reads as follows:

8.756:

Narrated Usama bin Zaid: the Prophet said, "A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim."

13. The Sacred Compilation Hadith Sahih Bukhari 7.354 reveals that the Holy Prophet caused *Jabir* a Muslim to pay loan to a Jew in Madina. The said Hadith reads as follows:

7.354:

Narrated Jabir bin 'Abdullah: There was a Jew in Medina who used to lend me money up to the season of plucking dates. (Jabir had a piece of land which was on the way to Ruma). That year the land was not promising, so the payment of the debt was delayed one year. The Jew came to me at the time of plucking, but gathered nothing from my land. I asked him to give me one year respite, but he refused. This news reached the Prophet whereupon he said to his companions, "Let us go and ask the Jew for respite for Jabir." All of them came to me in my garden, and the Prophet started speaking to the Jew, but he Jew said, "O Abu Qasim! I will not grant him respite." When the Prophet saw the Jew's attitude, he stood up and walked all around the garden and came again and talked to the Jew, but the Jew refused his request. I got up and brought some ripe fresh dates and put it in front of the Prophet. He ate and then said to me, "Where is your hut, O Jabir?" I informed him, and he said, "Spread out a bed for me in it." I spread out a bed, and he entered and slept. When he woke up, I brought some dates to him again and he ate of it and then got up and talked to the Jew again, but the Jew again refused his request. Then the Prophet got up for the second time amidst the palm trees loaded with fresh dates, and said, "O Jabir! Pluck dates to repay your debt." The Jew remained with me while I was plucking the dates, till I paid him all his right, yet there remained extra quantity of dates. So I went out and proceeded till I reached the Prophet and informed him of the good news, whereupon he said, "I testify that I am Allah's Apostle."

PART - XIII

ISLAM GUARANTEES RELIGIOUS FREEDOM & TOLERATION AND DOES NOT PERMIT TO USURP SACRED RELIGIOUS PLACE OF OTHERS:

1. The Holy Quran and the Holy prophet has commanded that no one should be compelled to change religion, idolater should be allowed to worship in their own way, the Holy prophets have appeared in every community and they should not be compared but respected and a Muslim can maintain good relation with his *Pagan* (i.e. worshipper of multi-deities) relative.

2. The Holy Quran (Noble Quran, Surah-2 Al-Baqarah, Ayat 256 at p.58) commands that there is no compulsion in religion. English translation of the said *Ayat* reads as follows:

“256. There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path. Whoever disbelieves in *Taghut* and believes in Allah, then he has grasped the most trustworthy handhold that will never break. And Allah is All-Hearer, All-Knower.

(Noble Quran, Surah-2 Al-Baqarah, Ayat 256)

3. The Holy Quran (Noble Quran, Surah-107 Al-Ma'un, Ayat 1-6 at p.852-853) permits people of other religion to carry out their religious practices according to their own religion. English translation of the said *Ayat* reads as follows:

“1. Say: (O Muhammad (*Arabic text*) .. . to these Mushrikun and Kafirun): “O Al-Kafirun (disbelievers in Allah, in His Oneness, in His Angles, in His Books, in His Messengers, in the Day of Resurrection, and in *Al-Qadar*.)!

2. I worship not that which you worship.

3. Nor will you worship that which I worship.

4. And I shall not worship that you are worshipping.

5. Nor will you worship that which I worship.

6. To you be your religion, and to me my religion (Islamic Monotheism).”

(Noble Quran, Surah-107 Al-Ma'un, Ayat 1-6 at p.852-853)

4. The Holy Quran (Noble Quran, Surah-10 Yunus, Ayat 47 at p.277) recognizes birth of Messengers of the Almighty in every community or nation. English translation of the said *Ayat* reads as follows:

“47. And for every *Ummah* (a community or a nation) there is a Messenger, when their Messenger comes, the matter will be judged between them with justice, and they will not be wronged.”

(Noble Quran, Surah-10 Yunus, Ayat 47 at p.277)

5. Sacred Compilation Hadith Sahih Bukhari 3.595 p.610-611 reveals that the Holy Prophet commanded not to give a Prophet superiority over another. Relevant portion of the said Hadith reads as follows:

“The Prophet said, “Do not give a prophet superiority over another, for on the Day of Resurrection all the people will fall unconscious and I

will be the first to emerge from the earth, and will see Moses standing and holding one of the legs of the Throne. I will not know whether Moses has fallen unconscious or the first unconsciousness was sufficient for him.”

(Hadith Sahih Bukhari 3.595 at p.611)

6. The Sacred Compilation Hadith Sahih Bukhari 4.407 reveals that Holy Prophet allowed a Muslim to keep good relation with his mother who was *pagan* i.e. idolater. The said Hadith reads as follows:

4.407:

Narrated Asma 'bint Abi Bakr: During the period of the peace treaty of Quraish with Allah's Apostle, my mother, accompanied by her father, came to visit me, and she was a pagan. I consulted Allah's Apostle, "O Allah's Apostle! My mother has come to me and she desires to receive a reward from me, shall I keep good relation with her?" He said, "Yes, keep good relation with her."

PART -XIV

FREEDOM OF RELIGION & RELIGIOUS PRACTICES TO HINDUS UNDER ISLAMIC RULE & MUSLIM LAW WAS GRANTED TO THE HINDUS:

1. Law of *Shar* as interpreted by Great Imam Abu Haneef recognized right of freedom of religion & religious practices of the Hindus of India under Islamic Rulers. Sultan Sikandar Lodi was dissuaded by the Greatest *Alim* of that age Miyan Abdullah Ajodhani from demolishing a Hindu Temple & putting ban on religious practices of the Hindus. Even Emperor Auragzeb who later on caused demolition of several Temples of the Hindus throughout his Empire in his *Farman* dated 1659 has admitted that *Shariyat* does not permit to demolish old Temples and impose restriction on performance of customary and other religious rituals of the Hindus. Ibn Battuta tells that Muhammad bin Tughlaq had granted permission to rebuild demolished Idol Temples to the King of China. During the reign of Caliphs, the people of other faith i.e. Zimmis were allowed to carry out processions, observe festivals, beat drums, erect places of worship & maintain images therein.
2. In *Waqiyat-i -Mutaqi* written by Rizkullah Mutaqi (b.1491-92 & d. 1581 A.D.), *Tabkats I Akbari* by Khwaja Nizamuddin Ahmad (completed in 1592-93 A.D.) and *Tarikh-i-Shahi* (completed in the beginning of Emperor Jahangir's reign) it has been narrated that once upon a time when Sultan Sikandar Lodi (r. 1488-1517 A.D.) was the Crown prince and known as Nizam Khan, he sought opinion of the *Alims* for the purpose of demolishing an ancient temple of the Hindus at *Thaneshwar* and putting ban on Hindus from taking holy dip in the Sacred pond at *Thaneshwar*. *Alims* unanimously made a request to him for putting that question to Greatest *Alim* of the age *Miyan Abdullah Ajodhani* who was available at that place. On being asked the Great *Alim Abdullah Ajodhani* replied that *Shar* does not permit destruction of ancient temple and prohibition of customary rites of the Hindus. From said answer Sikandar Lodi became very much annoyed and drew his sword inter alia stating that 'first I will kill you and thereafter attack Thaneshwar'. Then said *Alim* fearlessly answered that 'everyone has to die on one day and when anyone goes near a tyrant then he does it knowing fully well that his death is certain. I am not worried about my life but I say that if you had nothing to do with *Shar* then there was no need to put this question to me but since you asked me that question of *Shar* I replied it in accordance with *Shar*'. Relevant extracts of Hindi Translation of the aforesaid books as published in the book *Uttar Taimoorkalin Bharat Bhag. 1* (History of the Part-Taimoor Sultans of Delhi , Part. I) pages 104,228 and 322 read as follows:

कुरुक्षेत्र पर आक्रमण की योजना—

बाल्यावस्था में ऐसा हुआ कि एक बार उसने कुरुक्षेत्र पर आक्रमण करना निश्चय किया। इस विषय पर आलिमों का मत ज्ञात करने के लिए उसने उन्हें एकत्र किया। उस युग के सबसे बड़े आलिम (१६) मियां अब्दुल्लाह अजोधनी भी उपस्थित थे। सभी ने उनकी ओर संकेत किया कि, "इनकी उपस्थिति में हम कुछ भी नहीं कह सकते।" मियां निजाम ने मियां अब्दुल्लाह से इस विषय में पूछा। उन्होंने पूछा, "वहां क्या होता है?" मियां निजाम ने कहा कि, "उस स्थान पर प्रत्येक प्रदेश से काफिर एकत्र होकर स्नान करते हैं।" मियां अब्दुल्लाह ने पूछा कि, "यह प्रथा कब से चल रही है?" शाहजादे ने कहा कि, "यह बड़ी प्राचीन प्रथा है।" मियां अब्दुल्लाह ने पूछा कि, "आपके पूर्व मुसलमान बादशाहों ने इस संबंध में क्या किया?" शाहजादे ने कहा कि, "इसके पूर्व किसी बादशाह ने कुछ भी नहीं किया।" मुल्ला ने कहा कि, "इसका उत्तरदायित्व उन लोगों पर है। प्राचीन मंदिर को नष्ट करना उचित नहीं।" मियां निजाम ने रुष्ट होकर कटार निकाल ली और कहा कि, "सर्वप्रथम

मैं तुम्हारी हत्या करूंगा तदुपरान्त यहां आक्रमण करूंगा।” उन्होंने कहा कि, “सभी के लिए मरना अनिवार्य है। बिना ईश्वर के आदेश के कोई भी नहीं मरता। जब कोई भी व्यक्ति किसी अत्याचारी के पास जाता है तो अपने लिए मृत्यु निश्चय करके जाता है। जो कुछ होना है वह होगा किन्तु आपने मुझसे शरा की समस्या के विषय में प्रश्न किया तो मैंने उसका उत्तर दिया। यदि आपको शरा की चिन्ता नहीं है तो पूछने की कोई आवश्यकता नहीं।” सुल्तान ने अपने क्रोध को रोका और कहा कि, “यदि अनुमति प्रदान कर देते तो कई हजार काफ़िरों को नरक पहुंचा देता और अधिकांश मुसलमान उससे लाभान्वित होते।” मियाँ अब्दुल्ला ने कहा कि, “मुझे जो कुछ कहना था मैंने कह दिया, अब आप जानें।” वह दरबार से उठ खड़ा हुआ। अन्य आलिम लोग उसके साथ चल दिये। मलिकुल उल्मा अपने स्थान पर खड़े रहे। मियाँ निजाम ने किसी अन्य ओर ध्यान न दिया और कहा, “मियाँ अब्दुल्लाह आप कभी-कभी मुझसे भेंट करते रहें।” यह कहकर उन्हें विदा कर दिया। बाल्यावस्था में उसकी यह दशा थी।

थानेश्वर के स्नान के विरोध का प्रयत्न

उसने अपनी बाल्यावस्था में जब कि वह शाहजादा था यह सुना कि थानेश्वर में एक कुण्ड है, जहां हिन्दू एकत्र होकर स्नान करते हैं। उसने आलिमों से पूछा कि “इसके विषय में शरा” का क्या आदेश है?” उन्होंने उत्तर दिया कि “प्राचीन मंदिरों को नष्ट करने की अनुमति नहीं है। जबकि उस कुण्ड में प्राचीन काल से स्नान करने की प्रथा चली आ रही है, उसमें स्नान का निषेध आपके लिए उचित नहीं।” शाहजादे ने कटार निकाल ली और उस आलिम की हत्या का संकल्प करते हुए कहा कि - “तू काफ़िरों का पक्षपाती है।” उस बुजुर्ग ने उत्तर दिया कि, “जो कुछ शरा में लिखा है उसे मैं कहता हूँ और सत्य बात कहने में कोई भय नहीं।” शाहजादा संतुष्ट हो गया।

धर्मान्धता

एक दिन उसने आदेश दिया कि “थानेश्वर जाकर कुर्क्षेत्र (कुरुक्षेत्र) को मिट्टी से पाट दिया जाय और वह भूमि वहां के धर्मनिष्ठ व्यक्तियों की वजह मआश में नाप कर दे दी जाय।” उस काल का मलिकुल उलमा उस स्थान पर उपस्थित था। उसने शाहजादे से पूछा, “वहाँ क्या है?” उसने उत्तर दिया कि, “एक हौज है जहां १०००, २००० कोस से हिन्दू लोग स्नान हेतु आते हैं।” उसने पूछा, “कब से यह कार्य प्रारम्भ हुआ?” शाहजादे ने कहा, “वर्षों से यह बिदअत” चल रही है।” मलिकुल उलमा ने पुनः पूछा, “आप के पूर्व के बादशाह इस विषय में क्या करते थे?” उसने उत्तर दिया, “कुछ नहीं।” मलिकुल उलमा ने कहा, “यह तुम्हारा उत्तरदायित्व नहीं कारण कि तुम्हारे पूर्व मुसलमान बादशाहों ने इस विषय में कुछ नहीं किया?” शाहजादा इस बात से बड़ा गरम हुआ। उसने कहा, “इस काल (३१) के आलिम बड़े विचित्र प्रकार के हैं।” संक्षेप में, युवावस्था में वह इस्लाम का इतना बड़ा पक्षपाती था।

3. In his *Farman/Manshur* of Emperor Aurangzeb of 15th March, 1659 AD. has said that in accordance with the Sharia the ancient temples, are not to be destroyed as such there should be no interference in offering prayers in temples of the Hindus. In spite of the fact that subsequently this ruler himself caused demolition of the Ram Janamsthan temple at Ajodhya and other famous temples of the Hindus including those of Varanasi and Mathura, in his *Farman* dated 1659 he has accepted that sharia neither permit to interfere with the worship of the Hindus nor allows to destroy their temples. The extract of the *Farman* taken from page 142 the book *Mughal Documents AD.1628-59, Volume-II* compiled and translated by S.A.I. Tirmizi and published by Manohar Publishers, Delhi, 1995 Edn. reads as follows:

426. Manshur of Aurangzeb addressed to Abul Hasan states that it has been brought to the notice of the royal court that the Brahmins of Banaras are being removed from their ancient offices and that Hindus of Banaras and its neighbourhood are harassed. In accordance with the sharia the ancient temples, are not be destroyed and new ones are not to be built and since our innate kindness of disposition and natural benevolence, the whole of our untiring energy and our upright intentions are engaged in promoting the public welfare and betting the condition of all classes, high and low, it is ordered that no person should interfere with or disturb the Brahmins and other Hindus so that they may, as before, remain in their ancient occupation and engage themselves with peace of mind in offering prayers for the continuance of our God-gifted empire so that it may last for ever. (JPHS, V(I), pp.247-48)

20 Jumada II/1069 A.H./15 March, 1659

4. Ibn Battuta who held the office of the Kazi of Delhi as also functioned as Mutawalli of the Mausoleum of Sultan Kutubuddin during the reign of Sultan Mahommed Bin Tughlaq has noted down that Sultan Mahommed Bin Tughlaq had granted permission to the King of China to rebuild the idol temples that were demolished by his army in Himalayan region subject to payment of Jizya. Relevant extract from page 214 of his book 'IBN BATTUTA Travels in Asia and Africa 1325 -1354' translated and selected by H.A.R. Gibb first published in 1929 reprinted in 2007 by Low Price Publications, Delhi) reads as follows:

THE king of China had sent valuable gifts to the sultan, including a hundred slaves of both sexes, five hundred pieces of velvet and silk cloth, musk, jeweled garments and weapons, with a request that the sultan would permit him to rebuild the idol-temple which is near the mountains called Qarajil (Himalaya). It is in a place known as Samhal, to which the Chinese go on pilgrimage; the Muslim army in India had captured it, laid it in ruins and sacked it. The sultan, on receiving this gift, wrote to the king saying that the request could not be granted by Islamic law, as permission to build a temple in the territories of the Muslims was granted only to those who paid a poll-tax; to which he added "If thou wilt pay the jizya we shall empower thee to build it. And peace be on those who follows the True Guidance.

5. Great Jurist syed Amir Ali in his book 'The Spirit of Islam' (at p.272) substantiate that the Islam itself has ever maintained the most complete tolerance in respect of religion and if any excesses was done, it was by the passions of the ruler. Using religious element as a pretext. Relevant extract of the said book reads as follows:

"If we separate the political necessity which has often spoken and acted in the name of religion, no faith is more tolerant than Islam to the followers of other creeds. "Reasons of State" have led a sovereign here and there to display a certain degree of intolerance, or to insist upon a certain uniformity of faith; but the system itself has ever maintained the most complete tolerance. Christians and Jews, as a rule, have never been molested in the exercise of their religion, or constrained to change their faith. If they are required to pay a special tax, it is in lieu of military service, and it is but right that those who enjoy the protection of the State should contribute in some shape to the public burdens. Towards the idolaters there was greater strictness in theory, but in practice the law was equally liberal. If at any time they were treated with harshness, the cause is to be found in the passions of the ruler or the population. The religious element was used only as a pretext."

(Spirit of Islam by Syed Ameer Ali at p.272)

6. The 'Spirit of Islam' (at p.273) records the facts that the Holy Prophet gave guarantee of freedom of religion to the Christians of Najram and the neighboring territories, inter alia, stating that there would be no interference with the practice of their faith, monks would not be removed from their Monastery and no image would be destroyed. Relevant extract from the said book reads as follows:

“Has any conquering race or Faith given to its subject nationalities a better guarantee than is to be found in the following words of the prophet?

“To [the Christians of] Najran and the neighbouring territories, the security of God and the pledge of His Prophet are extended for their lives, their religion, and the property- to the present as well as the absent and other besides; there shall be no interference with [the practice of] their faith or their observances; nor any change in their rights or privileges; no bishop shall be removed from his bishopric, nor any monk from his monastery, nor any priest from his priesthood, and they shall continue to enjoy everything great and small as heretofore; no image or cross shall be destroyed; they shall not oppress or be oppressed; they shall not practice the rights of blood-vengeance as in the Days of ignorance, no tithes shall be levied from them nor shall they be required to furnish provisions for the troops.”

(Spirit of Islam by Syed Ameer Ali at p.273)

7. The ‘Spirit of Islam’ (at p.273-74) records the facts that during the reign of Caliphs, the people of other faith i.e. Zimmis were allowed to carry out processions, observe festivals, beat drums, erect places of worship. Relevant extract of the said book reads as follows:

“After the subjugation of Hira, and as soon as the people had taken the oath of allegiance, Khalid bin-Walid issued a proclamation by which he guaranteed the lives, liberty and property of the Christians, and declared that “they shall not be prevented from bearing their nakas and taking out their crosses on occasions of festivals.” “And this declaration” says Imam Abu-Yusuf was approved of and sanctioned by the Caliph and his council.

The non-Moslem subjects were not precluded from building new churches or temples. Only in places exclusively inhabited by Moslems a rule of this kind existed in theory. “No new Church or temple”, said Abdullah bin Abbas, “can be erected in a town solely inhabited by Moslems; but in other places where there are already Zimmis inhabiting from before, we must abide by our contract with them”.

...

“The best testimony to the toleration of the early Moslem government is furnished by the Christians themselves. In the reign of Osman (the third Caliph), the Christians patriarch of Merv addressed the bishop of Fars, named Simeon, in the following terms: “The Arabs who have been given by God the kingdom (of the earth) do not attack the Christian faith, on the contrary they help us in our religion; they respect our God and our Saints, and bestow gifts on our churches and monasteries.”

(Spirit of Islam by Syed Ameer Ali at p.273-74)

PART-XV

IDOLATOR HINDUS WERE RECOGNIZED AS ZIMMIS BY THE GREAT IMAM ABU HANEEF AS SUCH EMPEROR BABAR BEING FOLLOWER OF SAID IMAM'S SCHOOL HAD NO RIGHT TO ERECT MOSQUE OVER HINDU SHRINE:

1. Hindus were recognized as Jimmis by in 712 AD by the Great Imam Abu Haneef by virtue of authorities conferred upon the Doctors of Islam by Hadiths for the purpose of showing the people right path on the basis of correct interpretation of Law of *Shar*.
2. Mahomed Kasim Feristha in his book *Tarikhe Feristha* records that in reply to a question of Sultan Allaooddeen Khilji, Kaji Mugdis answered him that the Hindus were granted status of Jimmi by the Great Imam Abu Huneef. Relevant extract from page 198 of the English Translation of the said book ["History of the rise of the Mahomedan Power in India till the year AD 1612" translated by John Briggs first published in 1829 reprinted in 2006 by Low Price Publications, Delhi] reads as follows:

First question "From what description of Hindoos is it lawful to exact obedience and tribute" ---Answer. It is lawful to exact obedience and tribute from all infidels, and they can only be considered as obedient who pay the poll-tax and tribute without demur, even should it be obtained by force; for, according to the law of the Prophet, it is written, regarding infidels, 'Tax them to the extent that they can pay, or utterly destroy them'. The learned of the faith have also enjoined the followers of Islam. 'To slay them, or to convert them to the faith;' a maxim conveyed in the words of the prophet himself. The Imam Huneef, however, subsequently considers that the poll-tax, or as heavy a tribute imposed upon them as they can bear, may be substituted for death, and he has accordingly forbidden that their blood should be heedlessly spilt. So that it is commanded that the Juzeea (poll-tax) and Khiraj (tribute) should be exacted to the uttermost farthing from them, in order that the punishment may approximate as nearly as possible to death.

3. In 712 AD Imam Abu Hanifah recognized the Hindus of Sind and Multan as Jimmis it has been recorded on page 538 in the book 'The Mughal Empire' edited by renowned historian R. C. Majumdar (3rd Edn. 1990 published by Bharatiya Vidya Bhavan, Bombay). The relevant extract from the said book reads as follows:

In 712 A.D. Muhammad bin Qasim, the conqueror of Sind, accorded the Hindus of Sind and Multan the status of zimmis which was the special privilege of Christians and Jews, the famous Muslim Jurist, Abu Hanifah, recognized this enactment as legal.

4. The Sacred Compilation Jami' At-Tirmidhi (Vol.-5) Hadith 2681, 2682 & 2685 reveal that a learned jurist is greater than a thousand worshipers. Commentator explains that as a learned jurist does not only correct himself and is safe from the illusion of the Saitan, but also he protects others against the plots, conspiracies and errors of the devil and he guides them correctly by teaching the issues of religion he is superior than a dedicated worshiper who does not

have firm knowledge, the benefit of his worship is restricted to his own self, and also it is easy for the Satan to misguide him. From the said Hadith it can be inferred that superiority to the learned jurist has been given only for the purpose to tell the people what is right or wrong according to religion. Said Hadiths read as follows:

“2681. Ibn Abbas narrated that the Messenger of Allah said: “The *Faqih* is harder on *Ash-Shaitan* than a thousand worshippers.” **(Da‘if)**

Comments:

A dedicated worshipper who does not have firm knowledge, the benefit of his worship is restricted to his own self, and also it is easy for the Satan to misguide him; while a learned jurist does not only correct himself and is safe for the illusion of the Satan, but also he protects others against the plots, conspiracy and errors of the devil and he guides them correctly by teaching the issues of religion.

2682. Qais bin Kathir said: “A man from Al-Madhinah came to Abu Ad-Darda when he was in Dimashq. So he said: “What brings you O my nephew ? He replied: ‘A *Hadith* has reached me which you have narrated from the Messenger of Allah’. He said: ‘You did not come for some need?’ He said: ‘No’. He said: ‘Did you come for trade?’ He said: ‘No, I did not come except seeking this *Hadith*’. So he said: ‘Indeed, I heard the Messenger of Allah saying: ‘Whoever takes a path upon which he seeks knowledge, then Allah makes a path to Paradise easy for him. And indeed the angels lower their wings in approval of the one seeking knowledge. Indeed forgiveness is sought for the knowledgeable one by whomever is in the heavens and whomever is in the earth, even the fish in the waters. And superiority of the scholar over the worshipper is like the superiority of the moon over the rest of the celestial bodies. Indeed the scholars are the heirs of the Prophets, and the Prophets do not leave behind Dinar or Dirham. The only legacy of the scholars is knowledge, so whoever takes from it, then he has indeed taken the most able share. **(Da‘if)**

2685. Abu Umamah Al-Bahili narrated: “Two men were mentioned before the Messenger of Allah. One of them a worshipper, and the other a scholar. So, the Messenger of Allah said: ‘The superiority of the scholar over the worshipper is like my superiority over the least of you.’ Then the Messenger of Allah said: ‘Indeed Allah, His angels, the inhabitants of the heavens and the earths – even the ant in his hole, even the fish – say *Sulat* upon the one who teaches the people to do good.’ **(Hasan)**

PART - XVI

FREEDOM OF RELIGION SUBJECT TO PAYMENT OF JEZiyAH, AS HINDUS WERE PAYING SAID PROTECTION TAX IT WAS DUTY OF THE ISLAMIC RULER AND ARMY OF ISLAM TO PROTECT SHRINE AND LIFE OF THE HINDUS:

1. The Divine Law of *Shar* contained in Holy Quran and Hadiths guarantees freedom of religion and religious practices to the Jimmis/Dhimmiz (protectees) who pay jizya (a tax taken from the non-Muslims who are in the protection of the Muslim government). There were 20 conditions of Jeziyah one of which permits Muslim traveler to stay in Jimmis' temple while other permits them to stay in Jimmis' home for three days. These terms and condition were in practice which is very much apparent from the disclosure of Ibn Battuta that he stayed in the house of an old lady who was a Jimmy as in the city there was only one House of the Governor. Riyazu-S- Salatin, A History of Bengal on its page 67 has recorded the fact that Bakhtiyar Khilaji stayed in a temple within the territory of Kamrup Kingdom during his retreat from Tibbat campaign without harming the Temple.

2. Sacred Compilation Hadith Sahih Bukhari 4.386 p.836-837 reveals that the Holy Prophet's command was for the Muslim army to fight against the persons of other faith till they worship Allah alone or agree to pay jizya. Relevant portion of the said Hadith reads as follows:

“Our Prophet, the Messenger of our Lord, has ordered us to fight you till you worship Allah Alone or give Jizya (i.e. tribute); and our Prophet has informed us that our Lord says:— “Whoever amongst us is killed (i.e. martyred), shall go to Paradise to lead such a luxurious life as he has never seen, and whoever amongst us remain alive, shall become your master.”

(Hadith Sahih Bukhari 4.386 at p.837)

3. The Sacred Compilation Hadith Sahih Bukhari 4.404 p.843-844 reveals that asylum to non-Muslims living in Muslim territory was granted by Allah and His Holy Apostle. Relevant extract of the said Hadith reads as follows:

“... Narrated said: Abu Huraira once said (to the people), “What will your state be when you can get no Dinar or Dirhan (i.e. taxes from the Dhimmis) ?” on that someone asked him, “What makes you know that this state will take place, O Abu-Huraira ?” He said, “By Him in Whose Hands Abu Huraira's life is, I know it through the statement of the true and truly inspired one (i.e. the Prophet). “The people asked, “What does the Statement say ?” He replied, “Allah and His Apostle's asylum granted to Dhimmis, i.e. non-Muslims living in a Muslim territory will be outraged, and so Allah will make the hearts of those Dhimmis so daring that they will refuse to pay the Jizya they will be supposed to pay.”

(Hadith Sahih Bukhari 4.404 at p.844)

4. Sacred Compilation Hadith Sahih Muslim (Vol. III) Hadith 1731R1 p.180-181 reveals that when Holy Prophet appointed anyone as commander of an army he specially commanded them to invite the enemies who are polytheists to

three course of action and if they respond anyone of these the commander must accept it and keep from doing them any harm. Out of three options one was to demand Jizya from the people who refused to accept Islam and if they agree to pay no harm should be done to them. The said Hadith reads as follows:

[1731R1] It has been reported from Sulaiman b. Buraid through his father that when the Messenger of Allah (may peace of upon him) appointed anyone as leader of an army or detachment he would especially exhort him to fear Allah and to be good to the Muslims who were with him. He would say: Fight in the name of Allah and in the way of Allah. Fight against those who disbelieve in Allah. Make a holy war; do not embezzle the spoils; do not break your pledge; and do not mutilate (the dead) bodies; do not kill the children. When you meet your enemies who are polytheists, invite them to three courses of action. If they respond to any of these, you also accept it and keep from doing them any harm. Invite them to (accept) Islam; if they respond to you, accept it from them and desist from fighting against them. Then invite them to migrate from their lands to the land of Muhajirs and inform them that, if they do so, they shall have all the privileges and obligations of the Muhajirs. If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the Commands of Allah like other Muslims, but they will not get any share from the spoils of war or fai except when they actually fight with the Muslims (against the disbelievers). If they refuse to accept Islam, demand from them the Jizya. If they agree to pay, accept it from them and hold off your hands. If they refuse to pay the tax, seek Allah's help and fight them. When you lay siege to a fort and the besieged appeal to you for protection in the name of Allah and His Prophet, do not accord to them the guarantee of Allah and His Prophet, but accord to them your own guarantee and the guarantee of your companions for it is a lesser sin that the security given by you or your companions be disregarded than that the security granted in the name of Allah and His Prophet be violated. When you besiege a fort and the besieged want you to let them out in accordance with Allah's Command, do not let them come out in accordance with His Command, but do so at your (own) command, for you do not know whether or not you will be able to carry out Allah's behest with regard to them.

5. Sacred Compilation Hadith Sahih Muslim (Vol. III) Hadith 1732 and 1733 p.182 reveal that when Holy Prophet deputed anyone of his Companions on a mission he always directed him to show leniency and not to create aversion towards religion. The said Hadiths read as follows:

[1732] It is narrated on the authority of Abu Musa that when the Messenger of Allah (may peace of upon him) deputed any of his companions on a mission, he would say: Give tidings (to the people); do not create (in their minds) aversion (towards religion); show them leniency and do not be hard upon them.

[1733] It has also been narrated by Sa'id b. Abu Burda through his father through his grandfather that the Prophet of Allah (may peace be upon him) sent him and Mu'ath (on a mission) to the Yemen, and said (by way of advising them); show leniency (to the people); don't be hard upon them; given them glad tidings (of Divine favours in this world and the Hereafter); and do not create aversion. Work in collaboration and don't be divided.

6. Sacred Compilation Hadith Sahih Bukhari 2.559 p.381, 4.387 p.837, and 5.351 p.1103-1104 reveal that Holy Prophet allowed the King of Aila as well as Bahrain who were non-Muslims to remain and rule over their respective countries subject to payment of Jizya. Relevant extract from the Hadith 2.559 and 5.351 as well as full text of Hadith 4.387 read as follows:

"A strong wind blew at night and a man stood up and he was blown away to a mountain called Taiy. The King of Aila sent a white mule and a sheet for wearing to the Prophet as a present, and wrote to the Prophet that his people would stay in their place (and will pay Jizya taxation)."

(Hadith Sahih Bukhari 2.559 at p.381)

"Narrated Abu Humaid As-Saidi: We accompanied the Prophet in the Ghazwa of Tabuk and the king of Aila presented a white mule and a cloak as a gift to the Prophet. And the Prophet wrote to him a peace treaty allowing him to keep authority over his country."

(Hadith Sahih Bukhari 4.387 at p.837)

"...Allah's Apostle sent Abu 'Ubaida bin Al-Jarrah to Baharain to bring the Jizya taxation from its people, for Allah's Apostle had made a peace treaty with the people of Baharain and appointed Al-'Ala' bin Al-Hadrami as their ruler. So, Abu 'Ubaida arrived with the money from Baharain...."

(Hadith Sahih Bukhari 5.351 at p.1104)

7. Sacred Compilation of *Jami' At-Tirmidhi* (Vol. 3) *Hadith* 1587 and 1588 p.355 reveal that Holy Prophet took *Jizya* from the Zoroastrians of Hazar & Bahrain, Caliph Umar and Caliph Uthman took it in Persia from Persians. The said Hadiths read as follows:

"1587. Bajalah narrated that 'Umar would not take the Jizyah from the Zoroastrians until 'Abdur-Rahman bin 'Awf informed him that the Prophet took the Jizyah from the Zoroastrians or Hajar. (Sahih) There is no more dialogue in the Hadith than this. And this Hadith is Hasan Sahih.

1588. Malik narrated the Az-Zuhri that Sa'ib bin Yazid said: "The messenger of Allah took the Jizyah from the Zoroastrians of Bahmain, and 'Umar took it in Persia, and 'Uthman took it from the Persians."

Jami' At-Tirmidhi (Vol. 3) *Hadith* 1587 and 1588 at p.355

8. Sacred Compilation Hadith Sahih Bukhari 2.475, 4.287, 4.388 and 5.50 reveal the recommendation of Caliph Umar to his successor to abide by the rules and regulations concerning the Jimmis/Dhimmis (protectees). Relevant portion of the said Hadiths read as follows:

"... I recommend him to abide by the rules and regulations concerning the Dhimmis (protectees) of Allah and His Apostle, to fulfill their contracts completely and fight for them and not to tax (overburden) them beyond their capabilities."

(Hadith Sahih Bukhari 2.475 at p.355)

"... Narrated 'Amr bin Maimun: Umar (after he was stabbed), instructed (his would-be-successor) saying, "I urge him (i.e. the new Caliph) to take care of those non-Muslims who are under the protection of Allah and His Apostle in that he should observe the convention agreed upon with them, and fight on their behalf (to secure their safety) and he should not over-tax them beyond their capability."

(Hadith Sahih Bukhari 4.287at p.798)

"... Narrated Juwairiya bin Qudama at-tamimi: We said to 'Umar bin Al-Khattqab, O Chief of the believers! Advise us." He said, "I advise you to fulfill Allah's Convention (made with the Dhimmis) as it is the convention of your prophet and the source of the livelihood of our dependents (i.e. the taxes from the Dhimmis.)".

(Hadith Sahih Bukhari 4.388 at p.837)

"... I also recommend him concerning Allah's and His Apostle's protectees (i.e. Dhimmis) to fulfill their contracts and to fight for them and not to overburden them with what is beyond their ability."

(Hadith Sahih Bukhari 5.50 at p.1004)

9. The Sacred Compilation Hadith Sahih Bukhari 4.657 reveals that the Holy Prophet said that incarnation of Jesus would abolish Jizyah from non-Muslims. The said hadith reads as follows:

4.657:

Narrated Abu Huraira: Allah's Apostle said, "By Him in Whose Hands my soul is, surely (Jesus,) the son of Mary will soon descend amongst you and will judge mankind justly (as a Just Ruler); he will break the Cross and kill the pigs and there will be no Jizya (i.e. taxation taken from non Muslims). Money will be in abundance so that nobody will accept it, and a single prostration to Allah (in prayer) will be better than the whole world and whatever is in it." Abu Huraira added "If you wish, you can recite (this verse of the Holy Book): ""And there is none Of the people of the Scriptures (Jews and Christians) But must believe in him (i.e Jesus as an Apostle of Allah and a human being) Before his death. And on the Day of Judgment He will be a witness Against them."

10. The Sacred Compilation Hadith Sahih Bukhari 8.809 and 8.825 reveal that the Holy Prophet administered justice to a Jew according to his scripture *Torah*. The said Hadith reads as follows:

8.809:

Narrated Ibn 'Umar: A Jew and a Jewess were brought to Allah's Apostle on a charge of committing an illegal sexual intercourse. The Prophet asked them. "What is the legal punishment (for this sin) in your Book (Torah)?" They replied, "Our priests have innovated the punishment of blackening the faces with charcoal and Tajbiya." 'Abdullah bin Salam said, "O Allah's Apostle, tell them to bring the Torah." The Torah was brought, and then one of the Jews put his hand over the Divine Verse of the Rajam (stoning to death) and started reading what preceded and what followed it. On that, Ibn Salam said to the Jew, "Lift up your hand." Behold! The Divine Verse of the Rajam was under his hand. So Allah's Apostle ordered that the two (sinners) be stoned to death, and so they were stoned. Ibn 'Umar added: So both of them were stoned at the Balat and I saw the Jew sheltering the Jewess.

fbx8.825:

Narrated 'Abdullah bin 'Umar: The jews came to Allah's Apostle and mentioned to him that a man and a lady among them had committed

illegal sexual intercourse. Allah's Apostle said to them, "What do you find in the Torah regarding the Rajam?" They replied, "We only disgrace and flog them with stripes." 'Abdullah bin Salam said to them, 'You have told a lie the penalty of Rajam is in the Torah.' They brought the Torah and opened it. One of them put his hand over the verse of the Rajam and read what was before and after it. 'Abdullah bin Salam said to him, "Lift up your hand." Where he lifted it there appeared the verse of the Rajam. So they said, "O Muhammad! He has said the truth, the verse of the Rajam is in it (Torah)." Then Allah's Apostle ordered that the two persons (guilty of illegal sexual intercourse) be stoned to death, and so they were stoned, and I saw the man bending over the woman so as to protect her from the stones.

PART - XVII

ACCORDING TO THE HOLY PROPHET IN ONE LAND THERE CANNOT BE TWO QIBLAHS OR IDGAH & MOSQUE AS SUCH SRI RAMJANMASTHAN TEMPLE AND A MOSQUE CAN NOT CO-EXIST IN DISPUTED SITE:

1. The Holy Prophet has commanded that there must not be two sacred buildings of worship of two different religions in one land, in other words there cannot be a Masjid and an Idol Temple in one land. In view of the fact that in his said command the Holy Prophet has said that as Jizyah cannot be imposed upon Muslim, two *Qiblahs* cannot be in one land, coexistence of two *Qiblas* one of Hindus and other of Muslims in one land is mandatorily forbidden according to *Shar*. The Holy Prophet also says that neither prayer can be offered by forming rows between two columns nor funeral prayer can be offered in a mosque. An *Idgah* is a place where funeral prayers or the prayers of the two Ids are usually offered, as such same site cannot be a Masjid and *Idgah*. The Holy Quran says that foundation of a Masjid from very first day must be laid on piety not on hypocrisy and it must be always maintained by the Muslims. The Holy Prophet says that a *Masjid* must not be used as a home and place of gossiping. Imam Aboo Yoosuf and Imam Moohummud the disciples of the Great Imam Abu Haneef say that if at least two times prayer is not offered followed by Adhan/Ajan then the place is not a Public Mosque. It is admitted position that in the same land Temples were/are present prior to alleged erection of Mosque and even after the alleged erection of Mosque it retained columns of Hindu Temple. According to some of the plaintiffs admission lastly prayer was offered on 16th December 1949 while it was occupied in the night of 22/23rd December 1949 in abandoned condition. All these things as well as presence of *Chulha* as found during the ASI's excavation indicates that said building was being used as home of Deities and Sevayats & Pujaris; as it never acquired the status of a *Masjid* according to Muslim Law and belief no declaration as prayed for can be granted.
2. The Sacred Compilation Jami' At-Tirmidhi (Vol.-2) Hadith 633 reveals that in one land there must not be two Religious buildings of two different religions. Said Hadith reads as follows:

“**633.** Ibn Abbas narrated that the Messenger of Allah said: “Two *Quiblahs* in one land are of no benefit, and there is no *Jizyah* upon the Muslims. “(***Da'if***)
3. Divine Holy Quran Surah 9 At-Taubah Ayat 18 commands that Mosques can be maintained only by Muslims not by persons of other faith. Said Holy *Ayat* reads as follows:

256. There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path. Whoever disbelieves in Taghut and believes in Allah, then he has grasped the most trustworthy handhold that will never break. And Allah is All-Hearer, All-Knower.
4. Neil B.E. Baillie in his Book 'A Digest of Mahommedan Law' Part-First (Second Edition 1875) at its page 616 records that Imam Aboo Yoosuf and Imam

Moohummud the disciples of the Great Imam Abu Haneef say that if at least two times prayer is not offered followed by Adhan/Ajan then the place is not a Public Mosque. Relevant extract from the above referred pages reads as follows:

When an assembly of worshippers pray in a masjid with permission, that is delivery. But it is a condition that the prayers be with izan or the regular call, two times or more, and be public, not private. For though there should be an assembly, yet it is without izan, and the prayers are private instead of public, the place is no masjid according to the two disciples. But if one person were appointed to officiate both as moeezzin and imam, and he should make the call, and then stand up and pray alone, the place would become a masjid by general agreement.

5. Divine Holy Quran Surah 9 At-Taubah Ayat 107-110 commands that foundation of a Mosque must be laid from the first day on piety not hypocrisy otherwise a mosque built by hypocrite is destined to crumble down. The said Holy *Ayat* reads as follows:

107. And as for those who put up a mosque by way of harm and disbelief and to disunite the believers and as an outpost for those who warred against Allah and His aforetime, they will indeed swear that their intention is nothing but good. Allah bears witness that they are certainly liars.

108. Never stand you therein. Verily, the mosque whose foundation was laid from the first day on piety is more worthy that you stand therein (to pray). In it are men who love to clean and purify themselves. And Allah loves those who make themselves clean and pure [i.e. who clean their private parts with dust (which has the properties of soap) and water from urine and stools, after answering the call of nature.]

109. It is then he who laid the foundation of his building on piety to Allah and His Good Pleasure better, or he who laid the foundation of his building on the brink of an undetermined precipice ready to crumble down, so that it crumbled to pieces with him into the Fire of hell. And Allah guides not the people who are Zalimun (cruel, violent, proud, polytheist and wrong-doer).

Be it mentioned herein that this Holy *Ayat* came down in respect of Masjid-i-Jarar built in Madina by the hyporites with ulterior motive. Ultimately this Masjid was burnt and destroyed on command of the Holy Prophet.

6. The Sacred Compilation Hadith Sahih Bukhari 4.403 reveals that the Holy Prophet has termed such a person hypocrite who breaks promise, did not honour covenant, tells lie and behave in a very imprudent and misleading manner. The said Hadith reads as follows:

“4.403:

Narrated ‘Abdullah bin ‘Amr: Allah’s Apostle said, “Whoever has (the following) four characteristics will be a pure hypocrite: “If he speaks, he tells a lie; if he gives a promise, he breaks it, if he makes a covenant he proves treacherous; and if he quarrels, he behaves in a very imprudent evil insulting manner (unjust). And whoever has one of these characteristics, has one characteristic of a hypocrite, unless he gives it us.”

7. The Sacred Compilation Jami‘ At-Tirmidhi (Vol.-5) Hadith 2684 reveals that two things will not be together in a hypocrite that is to say good manners and *fiqh* in the religion. Said Hadiths and comments thereto read as follows:

“**2684.** Abu Hurairah narrated that the Messenger of Allah said: “Two things will not be together in a hypocrite: Good manners, and *Fiqh* in the religion.” (**Da‘if**)

8. The Sacred Compilation Jami‘ At-Tirmidhi (Vol.1) Hadith 321 reveals that Masjid cannot be used as a home nor a place for gossiping. Relevant portion of said Hadith reads as follows:

“**321.** ...

Ibn Abbas said, “It is not to be used as a home nor a place for talking about this or that.”

In view of the fact that during the ASI’s excavation at suit premises a *chulha* (an oven) has been found. It leaves no doubt that said structure was being used as home of Hindu deity and *chulha* was being used for preparing food for the deity as such said structure cannot be inferred to be a Masjid.

9. The Sacred Compilation Jami‘ At-Tirmidhi (Vol.1) Hadith 229 reveals that the Holy Prophet had commanded the Muslims not to pray between two columns. Said Hadith reads as follows:

“**229.** Abdul-Hamid bin Mahmud said: “We prayed behind one of the *Amirs*, the people compelled us such that we prayed between two columns. When we had prayed, *Anas bin Malik* said: ‘We would be prevented from this during the time of Allah’s Messenger.” (**Sahih**)

As in the disputed structure there were admittedly several columns and in course of forming rows for offering prayer those columns were unavoidable the said structure was not fit for offering prayer.

10. The Sacred Compilation Hadith Sahih Muslim (Vol.-II) 973 as interpreted by Imam Abu Hanifa on the basis of a Hadith recorded in Abu Dawud reveal that funeral prayer in the Mosque was prohibited.

[973] ‘Abbad b. ‘Abdullah b. Zubair reported that ‘A’isha ordered that the bier of Sa’d b. Abu Waqqas be brought into the mosque, so she can pray for him. The people disapproved this (act) of hers. She said: How soon the people have forgotten that the Messenger of Allah (SAW) had offered the funeral prayer of Suhail b. Al-Baida but in a mosque.

(I) There is a difference of opinion among the jurists whether a funeral prayer can be offered in a mosque or not. It is on the basis of this hadith that Imam Shafi'i of the view that it can be offered in a mosque. Imam Abu Hanifa and Imam Malik on the basis of a hadith recorded in Abu Dawud (viz. The Messenger of Allah said: He who offers funeral prayer in the mosque has nothing for him) disapprove saying the funeral prayer in the mosque. The scholars of Hadith.

11. In Idgahs/Musallas funeral prayers can be offered. In his book Mahommedan Law, Syed Ameer Ali, describes Mosques and Idghas or Musalla as follows:

“The word masjid is derived from sijda, devotion, and means a place of devotion or a place where prayers are offered to the Almighty.

A very fair description of an ordinary mosque is given by Herklot in his *Qanoon-i-Islam*. *Musallas* are prayer-grounds, and the word is derived from the word *salat* or prayers. In India, they are generally called *Idgahs* or *namaz-gahs*, and consist of a plot of ground set apart for the performance of the daily prayers or the Id prayers.”

Mahommedan Law by Syed Ameer Ali, 5th Edn. Reprint 2009, published by Hind Publishing House, Allahabad, p.418 & 419)

“Every ground set apart for prayers is not necessarily a *musallah* and subject to the rules governing a mosque. A *musalla* is a place where funeral prayers or the prayers of the two Ids are usually offered. In such cases only the place where the congregation gather and the worship is performed that is governed by the rules governing a mosque.

(*Ibid.* p.420)

PART XVIII

STRUCTURE HAVING IMAGES/IDOLS AND DESIGNED ONE CANNOT BE A MASJID UNDER LAW OF SHAR AS SUCH THE DISPUTED STRUCTURE AS IT WAS CAN NOT BE TERMED AS A MOSQUE:

1. The Holy prophet has said that angels do not enter in a house which has images, portraits, pictures, idols etc. and even the designed garments detract attention from prayer and, for that reason prohibited to decorate a mosque with pictures. As the disputed structure on its columns and other parts had engraved/chiseled images/idols of Load-bearing *Yakshas*, *Devis*, Divine - couples, *Kalash*, Lotus, Leaves, *Varah*, *Swastiks*, *Srivatsa*, *Kapot-pallis*, etc. it does not come within the definition of Masjid according to Muslim Religious Law and belief but it comes within the definition of a Hindu Temple according to Hindu Personal Religious Law and belief.
2. The Sacred Compilation Hadith Sahih Muslim (Vol.-I) 528 reveals that the Holy Prophet prohibited to decorate Mosques with pictures. Said Hadith reads as follows:

[528] A'isha reported: Umm Habiba and Umm Salama mentioned before the Messenger of Allah (may peace be upon him) a church which they had seen in Abyssinia and which had pictures in it. The Messengers of Allah (may peace be upon him) said: When a pious man amongst them (among the religious groups) dies they build a place of worship on his grave, and then decorate it with such pictures. They would be the worst of creatures on the Day of Judgment in the sight of Allah.

From the aforesaid Hadith it is crystal clear that there is forbiddance in Islam to decorate the Mosque with pictures. As such a building decorated with pictures can't be declared as a Masjid.

3. The Sacred Compilations Hadith Sahih Muslim (Vol.-III) 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111 and 2112 as well as Jami' At-Tirmidhi (Vol.-V) Hadith 2804 reveal that the Holy Prophet had acknowledged that the Angels do not enter a house in which there is an object of images or a dog. Said Hadiths read as follows:

(Set out Hadith Sahih Muslim from running page 101 to 107)

"2804. Ibn abbas narrated: "I heard Abu Talhah saying: 'I heard the Messenger of Allah, saying: "The angels do not enter a house in which there is a dog or an object of images." (*Sahih*)

Comments:

The taking or drawing of a picture is not allowed, keeping it is also not permissible, and whoever does so is deprived of the blessed and merciful supplications of the angels; while a person is in need of mercy and blessing at every moment. Likewise, a dog is an impure animal and some are of a satanic nature and the angels despise the devil."

(Jami' At-Tirmidhi (Vol.-V) Hadith 2804)

From the aforesaid Hadiths it is crystal clear that a building which contains images or dogs does not come within the definition of an

“Abode of Angels” for the reasons of such building being hated by the angels.

The Sacred Compilation Hadith Sahih Muslim (Vol.-I) 556 reveals that the Holy Prophet prohibited to use designed garment at the time of prayer. Said Hadith reads as follows:

[556] A'isha reported: The Apostle of Allah (may peace be upon him) prayed in a garment which had designs over it, so he (the Holy Prophet) said :Take it to Abu Jahm and bring me a plain blanket from him, because its designs have distracted me.

From the aforesaid Hadiths it is known that designs detract attention from prayer wherefrom it can be necessarily inferred that a Masjid wherein prayer is offered to Almighty must not have design in it otherwise it will detract the attention of the worshippers from prayer and lose its status of being a Masjid.

The Muwatta:Imam Malik 1743 reveal that the Holy Prophet declined to use a pillow (mattress) painted with pictures and said that no angels enter the house that contains a picture as also that the makers of pictures will suffer punishment on the day of judgment said Muwatta 1743 reads as follows:

(1743) 'A 'ishah reported that she bought a pillow (mattress) on which were painted pictures. When the Messenger of Allah (may peace be upon him) saw it, he kept standing at the door of her apartment and did not enter and his face showed signs of displeasure. She said : Messenger of Allah, I repent and ask forgiveness of Allah and His Messenger; what fault is mine ? He asked: What pillow (mattress) is this ? She said: I bought it, so that you may sit on it, recline on it. The Messenger of Allah (may peace be upon him) said: The makers of pictures will suffer punishment on the Day of Judgment. They will be told to give life to what they had painted in the world. Then he added : No angels enter the house that contains pictures.

PART -XIX

THERE CAN NOT BE A MOSQUE IN A PLACE SURROUNDED BY GRAVES AS FACING TOWARDS GRAVES NAMAZ CAN NOT BE OFFERED:

1. In the schedule of the plaint the suit premises has been shown to be surrounded on all four sides by the graves, and sacred Hadiths prohibit from - offering prayers towards graves, visiting the graves of strangers, sitting on graves and erecting tent over a grave as such according to Islamic Law and tenets the Scheduled Premises was never appropriate place for offering prayers to Merciful Almighty *Allah*. As such no declaration of Mosque as prayed for can be granted.
2. The Sacred Compilation Jami' AT-Tirmidhi (Vol.-2) Hadith 1050 reveals that the Holy Prophet has commanded not to sit on the graves nor perform *Salat* i.e. prayer towards graves .

“**1050.** Abu Marthad Al-Ghanawi narrated that the prophet said: “Do not sit on the graves nor perform *Salat* towards them.” **(Sahih)**

(He said) There are narrations on Amr bin Hazm, and Bashir bin Al-Khasasiyyah.

(Another route) with the chain, and it is similar.”
3. The Sacred Compilation Jami' AT-Tirmidhi (Vol.-2) Hadith 1054 and *ibid* (Vol.1) Hadith 230 reveal that the Holy Prophet had prohibited Muslims from visiting the graves except the grave of their mothers. The said Hadith reads as follows:

“**1054.** Sulaiman bin Buraidah narrated from his father that the Messenger of Allah said: “I had prohibited you from visiting the graves. But Muhammad was permitted to visit the grave of his mother: so visit them, for they will remind you of the Hereafter.”

Jami' AT-Tirmidhi (Vol.-2) Hadith 1054

“320. Ibn 'Abbas narrated: “Allah's Messenger cursed the women who visit the graves, and those who use them as *Masajid* and put torches on them.” **(Da'if)**

Jami' At-Tirmidhi (Vol.1) Hadith 230

As such to go an alleged Mosque surrounded on all four sides by graveyards means to visit the graves of strangers every day which act has been prohibited in Islam wherefrom it can be safely inferred that the Muslims are forbidden from offering prayers in a graveyard-locked place/building.
4. The Sacred Compilation Jami' AT-Tirmidhi (Vol.-5) Hadith 2890 reveals that even a tent cannot be erected over the grave as it invites sin.

“**2890.** Ibn Abbas narrated: “One of the Companions of the Prophet put up a tent upon a grave without knowing that it was a grave. When he realized that it was a person's grave, he recited *Surat Al-Mulk* until its completion. Then he went to the Prophet and said, ‘O Messenger of Allah [Indeed] I erected my tent without realizing that it was upon a grave. So when I realized there was a person in it I recited *Surat Al-*

Mulk until its completion.' So the Prophet said: 'It is a prevention, it is a salvation delivering from the punishment of the grave.' (**Da'if**)"

5. Neil B.E. Baillie in his Book 'A Digest of Mahomedan Law' Part-First (Second Edition 1875) containing the doctrines of the Hanifeea Code of Jurisprudence at page 621-22 records that the bodies buried in the ground can be exhumed by the rightful owner if the land was usurped. Relevant extract from the above referred pages reads as follows:

When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may be lawfully exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption.

Be it mentioned herein that the Plaintiffs' witnesses have admitted that the graves were dug up by the Hindus after purchasing the lands wherein graves were located. It is settled law that public Graveyard can not be sold wherefrom it becomes crystal clear that it was not a public Graveyard meant for the Muslims.

6. The Sacred Compilation Jami' AT-Tirmid (Vol.-2) Hadith 1052 reveals that the Holy Prophet had prohibited plastering graves, writing on them, building over them and treading on them.

1052. Jabir narrated : "The Messenger of Allah prohibited plastering graves, writing on them, building over them, and treading on them."

As such it cannot be inferred that the plastered graves mentioned in Commissioner's report in 1950 were built by Emperor Babur or his soldiers who died in alleged war between him and the then ruler of Ajodhya because the Emperor Babur was a scholar of Hanafi School of Islamic Law which does not permit to build plastered graves of soldiers.

PART- XX

IN VICINITY OF BELLS THERE CANNOT BE A MOSQUE BECAUSE IT IS REVELATION OF THE HOLY PROPHET THAT BELL IS ABODE OF SAITAN, CONTRAY TO IT BELL IS INEGRAL PART OF 16 ORGANS OF RELIGIOUS CUSTOMS OF WORSHIP OF THE HINDUS AS SUCH AS ALL ALONG BELLS REMAINED IN THE DISPUTED SITE IT CAN'T BE A MOSQUE:

1. In a Hindu Temple ringing of bell is integral part of worship while according to *Shar* bell is considered to be an instrument of Satan and angels do not enter in such a house where bell is as such, a place where angels do not enter can't be a Masjid. As it is evident from the Gazetteer of 1877-78 and Millet's Settlement Report that till 1855 Hindus were worshipping in the same and one building which was allegedly known as Mosque-temple said to be erected by Moghul Emperor Babur over the sacred site of Sri Ramajanamsthan by demolishing Hindu temple of that shrine and on annexation of Oudh to British India (on 13th February, 1856 and Lord Canning's proclamation on 15th March, 1859, confiscating all proprietary rights in the soil of the Oudh Province) the Administration made an enclosure bifurcating the Temple compound and thereby ordered Hindus not to enter inside the said building in consequence whereof Hindus erected a Platform in the Temple compound just after enclosure and started worshipping thereon, but from the several applications of the persons claiming to be Mutavallis/ Muezzins/ Khattibs it is very much apparent that even after 1855 and onwards Hindus were continuously worshipping in the said temple and, from their application of 1883 it becomes crystal clear that in addition to performing Idol worship in the said disputed Temple-Mosque building Hindus were celebrating their festivals as such for all practical purposes said building was a Hindu temple and according to Musalman Law due to presence of Idols & Bells it was not at all a Masjid.

2. The Sacred Compilation Hadith Sahih Muslim (Vol.-III) 2113 and 2114 reveal that the Holy Prophet had said that Angels do not accompany the person who has with him a bell because the bell is the musical instrument of the Satan. The said Hadiths read as follows:

[2113] Abu Huraira reported Allah's Messenger (may peace be upon him) had said: Angels do not accompany the travellers who have with them a dog and a bell.

[2114] Abu Huraira reported that Allah's Messenger (may peace be upon him) had said: The bell is the musical instrument of the Satan.

3. The Sacred Compilation Hadith Sahih Muslim (Vol.-I) 377 as well as Jami' At-Tirmidhi (Vol.-1) 190 reveal that the Holy Prophet did not approve the method of giving Ajan/Adhan by ringing the bell like the persons of other faith; of course, reason behind this was that it was an instrument of Satan. Said Hadiths read as follows:

"[377] Ibn Umar reported: When the Muslims came to Mediha, they gathered and sought to know the time of prayer but no one summoned them. One day they discussed the matter, and some of them said: Use something like the bell of the Christians and some of them said: Use

horn like that of the Jews. Umar said: Why may not a man be appointed who should call (people) to prayer? The Messenger of Allah (may peace be upon him) said: O Bilal, get up and summon (the people) to prayer."

(Hadith Sahih Muslim (Vol.-I) 377 at page 256)

"190. Ibn Umar narrated: "When the Muslims arrived in Al-Madinah, they used to assemble for the *Salat*, and guess the time for it. There was no one who called for it (the prayers). One day they discussed that some of them said that they should use a bell like the bell the Christians use. Others said they should use a trumpet like the horn the Jews use. But Umar [bin Al-Khattab] said, 'Wouldn't it be better if we had a man call for prayer?' He said, 'So Allah's Messenger said: 'O Bilal! Stand up and call for the *Salat*.'"

(Jami' At-Tirmidhi (Vol.-1) 190 at page 215)

4. In 'Ibn Battuta' Travels in Asia and Africa' (1325-1354) on page 142 Ibn Battuta writes that he became surprised when he heard bells ringing on all sides of the mosque wherein he was staying. In his note on page 357 of the said book the editor/translator explains that the Muslim hold the ringing of bells in the greatest abhorrence and believe that the angels will not enter in the house wherein bells are rung. As the suit premises was surrounded by all sides from the temples and even in the alleged Temple -Mosque building Hindus were worshiping by ringing bells, according to *Shar* it cannot be termed as mosque. Relevant extracts from the said book read as follows:

We stayed at Kafa in the mosque of the Muslims. An hour after our arrival we heard bells ringing on all sides. As I had never heard bells before, I was alarmed and bade my companions ascend the minaret and read the Koran and issue the call to prayer. They did so, when suddenly a man entered wearing armour and weapons and greeted us. He told us that he was the qadi of the Muslims there, and said "When I heard the reading and the call to prayer, I feared for your safety and came as you see.

Muslims hold the rigging of bells in the greatest abhorrence, and attribute to the Prophet the saying: "The angels will not enter any house wherein bells are rung."

5. The Sacred Compilation Hadith Sahih Muslim (Vol.-II) 851 & 851R3 reveal that it was commanded by the Holy Prophet that Muslims must observe silence during sermon on Friday. The said Hadiths read as follows:

[851] Abu Huraira reported what Allah's Messenger (SAW) had said: If you ask your companion to be quiet on Friday while the Imam is delivering the sermon, you have in fact chattered.

[851R3] On the authority of Abu Huraira that the Holy Prophet said: "If you said to your companion: Be quiet, on Friday, and the Imam is delivering the sermon, you have in fact chattered.

From the aforesaid Hadith it becomes clear that in the noisiest place where bells were/are being rung and Conch Shells were/are being blown prayer could not be offered. As it is admitted by the then alleged Mutawalli that Conch Shell was being blown by the Pujari *Neehang Singh* even in 1861 said Structure can't be a Masjid but for all practical purposes it was/is only Temple.

PART - XXI

AS THERE WAS NO PROVISION OF WATER FOR WADU IN THE DISPUTED STRUCTURE IT CAN'T BE A MOSQUE BUT IT WAS ALL ALONG A HINDU TEMPLE:

1. Without performing *wadu* by pure water in a mosque cannot offer prayer. One Hadith says that for Friday's prayer one should take a bath in his house and thereafter perform *wadu* in a Mosque and then he should offer prayer from which it becomes crystal clear that performing *wadu* in a mosque is mandatory pre condition for offering one's prayer to Almighty Merciful *Allah*. As Friday's prayer is offered in congregation at least on that day huge quantity of water is required but in the alleged Temple-Mosque premises there was no such provision of water for Muslims for performing *wadu* from which it can be safely inferred that said structure was neither meant for offering *Salat* nor was a *Masjid* at all but all along it was a temple as such the same cannot be declared *Baburi Masjid*.

2. The Sacred Compilation Hadith Sahih Muslim (Vol.-II) 844 & 845 reveal that before offering Friday's prayer one should take a bath in his house and thereafter perform *Wadu* in a Mosque. Said Hadiths read as follows:

[844] 'Abdullah reported that he heard Allah's Messenger (SAW) who said: When any one of you intends to come for Friday prayer, he should take a bath.

[845] 'Abdullah (b. Umar) reported from his father, that while he was addressing the people on Friday (sermon), a person, one of the Companions of the Messenger of Allah (SAW), entered (the mosque). 'Umar said to him loudly: What is the time hour (for attending the prayer)? He said: I was busy today and I did not return to my house when I heard the call (to Friday prayer), but I performed ablution (only). Upon this 'Umar said: Just ablution! You knew that the Messenger of Allah (SAW) commanded (us) to take a bath (on Friday).

3. The Sacred Compilations Hadith Sahih Muslim (Vol.-I) 225; (Vol.-II) 844-847R1 and Jami' At-Tirmidhi (Vol.-1) Hadiths 1-5, 90, 200-201, 497-498 say that prior to offering prayer performance of *Wadu* by pure water is necessary and for Friday's prayer it is must to take bath in one's house then visit the *Masjid* and perform *Wadu* in it by water prior to offering prayer.

[225] Hammam b. Munabbih, who is the brother of Wahb. Munabbih, said: This is what has been transmitted to us by Abu Huraira from Muhammad, the Messenger of Allah (SAW), and then narrated a hadith out of them and observed that the Messenger of Allah (SAW) said: The prayer of no one amongst you would be accepted in a state of impurity till he performs ablution.

[844] 'Abdullah reported that he heard Allah's Messenger (SAW) who said: When any one of you intends to come for Friday prayer, he should take a bath.

[844R1] 'Abdullah b. 'Umar reported that the Messenger of Allah (SAW) said when he was standing on the pulpit: He who comes for Friday prayer he should take a bath.

[844R2] This hadith has been narrated by Ibn Umar by another chain of transmitters.

[844R3] 'Abdullah (b. Umar) reported on the authority of his father that he heard the same thing from the Messenger of Allah (SAW).

[845] 'Abdullah (b. 'Umar) reported from his father, that while he was addressing the people on Friday (sermon), a person, one of the Companions of the Messenger of Allah (SAW), entered (the mosque). 'Umar said to him loudly: What is the time hour (for attending the prayer)? He said: I was busy today and I did not return to my house when I heard the call (to Friday prayer), but I performed ablution (only). Upon this 'Umar said: Just ablution! You knew that the Messenger of Allah (SAW) commanded (us) to take a bath (on Friday).

[845R1] Abu Huraira reported: 'Umar b. al-Khattab was delivering a sermon to the people on Friday when 'Uthman b. 'Affan came there. 'Umar insinuated to him and said: What would become of those persons who come after the call to prayer? Upon this 'Uthman said: Commander of the faithful, I did no more than this, that after listening to the call, I performed ablution and came (to the mosque). 'Umar said: Just ablution! Did not you hear the Messenger of Allah (SAW) saying: When any one of you comes for Friday prayer he should take a bath.

[846] Abu Sa'id al-Khudri reported what Allah's Messenger (SAW) had said: Taking a bath on Friday is essential for every adult person.

[847] A'isha reported: The people came for Friday prayer from their houses in the neighbouring villages dressed in woollen garments full of dust which emitted a foul smell. A person among them (those who were dressed so) came to the Messenger of Allah (SAW) while he was in my house. The Messenger of Allah (SAW) said to him: Were you to cleanse yourselves on this day.

[847R1] A'isha reported: The people (mostly) were workers and they had no servants. Bad-smell thus emitted out of them. It was said to them: If you were to take on Friday.

1. Ibn 'Umar narrated that the Prophet said, : "Salat will not accepted without purification nor charity from Ghulul." (Sahih)

2. Abu Hurairah narrated that Allah's Messenger said: "When a Muslim or believer, performs Wudu, washing his face, every evil that he looked at with his eyes leaves with the water – or with the last drop of water, or an expression similar to that – and when he washes his hands, every evil he did with his hands leaves with the water – or with the last drop of water – until he becomes free of sin." (Sahih)

3. 'Ali narrated that the Prophet said: "The key to Salat is the purification, its Tahrim is the Takbir, and its Tahlil is the Taslim." (Hasan)

4. Jabir bin 'Abdullah, may Allah be pleased with them, narrated that Allah's Messenger said: "The key to Paradise is Salat, and the key to Salat is Wudu". (Hasan)

5. Anas bin Malik said: "When the Prophet entered the toilet he would say: "O Allah! Indeed I seek refuge in you."

Shu'bah (one of the narrators) said: "Another time he said: 'I seek refuge in You from Al-Khubthi and Al-Khabith' or; 'Al-Khubthi and Al-Khaba'ith'". (Sahih)

90. Ibn 'Umar narrated: "A man greeted the Prophet (with Salam), and he was urinating, so he did not respond to him." (Sahih)

200. Abu Hurairah narrated that Allah's Messenger said: "None should call the Adhan except for one with Wudu." (Da'if)

201. Ibn Shihab narrated that Abu Hurairah said: "None should call for the prayer except for one with Wudu." (Da'if)

497. Samurah bin Jundab narrated that Allah's Messenger said: "Whoever performs Wudu on Friday, then he will receive the blessing, and whoever performs Ghusl then Ghusl is more virtuous. (Hasan)

498. Abu Hurairah narrated that Allah's Messenger said: "Whoever performs Wudu', performing his Wudu well, then he comes to the Friday (prayer), and gets close, listens and is silent, then whatever (sin) was between that and (the last) Friday are forgiven for him, in addition to three days. And whoever touches the pebbles, he was committed Lagha (useless activity)." (Sahih)

4. Holy Quran Surah 5 Al-Ma'idah Ayat 6 and the Sacred Compilation Hadith Sahih Muslim (Vol.-I) 367-370 provides that Tayammum i.e. purification by clean earth can be done only in extreme exigency at the time of travelling or war campaign when water is not available otherwise *Wadu* must be performed by water.

6. O you who believe! When you intend to offer As-Salat (the prayer), wash your faces and your hands (forearms) up to the elbows, rub (by passing wet hands over) your heads, and (wash) your feet up to the ankles. If you are in a state of Janaba (i.e. after a sexual discharge), purify yourselves (bath your whole body). But if you are ill or on a journey, or any of you comes after answering the call of nature, or you have been in contact with women (i.e. sexual intercourse), and you find no water, then perform Tayammum with clean earth and rub therewith your faces and hands. Allah does not want to place you in difficulty, but He wants to purify you, and to complete His Favour to you that you may be thankful.

[367] A'isha reported: We went with the Apostle of Allah (may peace be upon him) on one of his journeys and when we reached the place Baida or That Al-Jaish, my necklace was broken (and fell some where). The Messenger of Allah (may peace be upon him) along with other people stayed there looking for it. There was neither any water at that place nor was there any water with them (the Companions of the Holy Prophet). Some people came to my father Abu Bakr and said: Do you see what' Aisha has done ? She has detained the Messenger of Allah (may peace be upon him) and the people accompanying him, and there is neither any water here or with them. So Abu Bakr came there and the Messenger of Allah (may peace be upon him) was sleeping with his head on my thigh. He (Abu Bakr) said: You have detained the Messenger of Allah (may peace be upon him) and the people and there is neither water here nor with them. She (Aisha) said: Abu Bakr scolded me and uttered what Allah wanted him to utter and nudged my hips with his hand. And there was nothing to prevent me from stirring but the fact that the Messenger of Allah (may peace be upon him) was lying upon my thigh. The Messenger of Allah (may peace be upon him) slept till it was dawn at a waterless place. So Allah revealed the verses pertaining to Tayammum. Usaid b. Al-Hudair who was one of the leaders said: This is not the first of your blessings, O Family of Abu Bakr. Aisha said: We made the camel stand which was my mount and found the necklace under it.

[368] Shaiq reported: I was sitting in the company of Abdullah and Abu ' Musa, when Abu Musa said: O' Abdel – Rahaman (Kunya of Abdullah b. Mas'ud), what would you like a man to do about the prayer if he experiences a seminal emission or has sexual intercourse but does not find water for a month ? Abdullah said: He should not perform Tayammum even if he does not find water for a month. Abdullah said: Then what about the verse in Sura Ma'ida: <<If you do not find water, betake yourself to clean with dust >>? Abdullah said: If they were granted concession on the basis of this verse, there is a possibility that they would perform Tayammum with dust on finding water very cold for themselves. Abu Musa said to Abdullah: You have not heard the words of Ammar : The Messenger of Allah (may peace be upon him) sent me on an errand and I had a seminal emission, but could find no water, and rolled myself in dust just as a beast rolls itself. I came to the Messenger of Allah (may peace be upon him) and mentioned that to him and he (the Holy Prophet) said: It would have been enough for you to do this. Then he struck the ground with his hands once and wiped his right hand and with the help of this left hand and exterior of his palms and his face. Abdullah said: Didn't you see that Umar was not fully satisfied with the words of Ammar only ?

[369] Umair, the freed slave of Ibn' Abbas, reported: I and Abdel-Rahman b. Yasir, the freed slave of Maimuna, the wife of the Apostle (may peace be upon him), came to the house of Abul-Jahm b. Al-Harith Al-Simma Ansari and he said: The Messenger of Allah (may peace be upon him) came from the direction of A-Jamal well and a man met him; he saluted him but the Messenger of Allah (may peace be upon him) made no response, till the Holy Prophet came to the wall, wiped his face and hands and then returned his salutations.

[370] Ibn Ymar reported: A man happened to pass by the Messenger of Allah (may peace be upon him) when he was making water and saluted him. but he did not respond to his salutation.

Since there was no provision of water reservoir in the disputed premises the question of performing wadu by huge crowd for Friday's prayer did not arise at all in other words the said structure was never used as Masjid for offering congregational prayer on Friday but all along remained as Hindus' Shrine.

PART- XXII

WAKIF MUST BE OWNER OF THE PROPERTY FOR CREATING VALID WAQF AS EMPEROR BABUR WAS NOT OWNER OF THE HINDU SHRINE SRI RAMAJANMASTHAN HE OR HIS COMMANDERS HAD NO RIGHT TO ERRECT MOSQUE AND ANY BUILDING ERECTED CONTRARY TO RELIGIOUS MANDATE OF THE ISLAM CANNOT BE CONSTRUED A MOSQUE AS SUCH THE DISPUTED STRUCTURE WAS ALL ALONG A HINDU TEMPLE & SACRED SHRINE:

1. By defeating Sultan Ibrahim Lodi in the battle of *Panipat* Emperor Babur acquired only those rights that said Monarch had. As defeated Monarch was not Owner of the Sri Ramajanamsthan Temple at Ayodhya, according to *Shar* Emperor Babur did not acquire title of the said Temple. According to the Divine Law of *Shar* a Muslim can erect Masjid only on such land of which he is lawful owner and he can create Wakf only of his own lawful property. Unless the first prayer was offered with permission of the lawful owner even dedication of Masjid and Wakf by user can not be claimed. *Shar* does not permit conversion of a Temple into a Mosque and says that even if a mansion was given by a Jimmi to Muslims for their using it as Masjid, after death of such Jimmi his said mansion goes back to his heirs. Suffice to say that according to *Shar* the Wakif must be owner of the property at the time of its dedication otherwise Wakf is invalid. As Emperor Babur was not owner of the Suit-land, alleged creation of Wakf for Masjid and Graveyard was ab initio void and the Plaintiffs are not entitled for the reliefs as prayed for in the instant Suit.
2. The Sacred Compilation Hadith Sahih Bukhari 3.92 as well as Sacred Compilation Hadith Sahih Muslim (Vol.-I) 524 reveal that the first Mosque in Madina was built by the Holy Prophet on the land which was gifted to the Holy Prophet by its owners, wherefrom it becomes crystal clear that a Mosque can be built by the *Wakif* only on the land acquired/procured lawfully. Said Hadiths read as follows:

3.92:

Narrated Anas:

The Prophet came to Medina and ordered a mosque to be built and said, "O Bani Najjar! Suggest to me the price (of your land)." They said, "We do not want its price except from Allah" (i.e. they wished for a reward from Allah for giving up their land freely). So, the Prophet ordered the graves of the pagans to be dug out and the land to be leveled, and the date palm trees to be cut down. The cut date palms were fixed in the direction of the Qibla of the mosque.

[524] Anas b. Malik reported: The Messenger of Allah (may peace be upon him) came to Medina and stayed in the upper part of Medina for fourteen nights with a tribe called Bani Amr b Auf. He then sent for the chiefs of Bani Al-Najjar, and they came with swords around their necks. He (the narrator) said: I perceive as if I am seeing the Messenger of Allah (may peace be upon him) on his ride with Abu bark behind him and the chiefs of Banu Al-Najjar around him till he alighted in the courtyard of Abu Ayyub. He (the narrator) said: The Messenger of Allah (may peace be upon him) said prayer when the time came for prayer, and he prayed in the fold of goats and sheep. He then ordered mosques to be built and sent for the chiefs of Banu Al-Najjar, and they came (to him). He (the Holy Prophet) said to them: O Banu Al-Najjar, sell me your lands. They said: No, by Allah, we would not demand their price, but (reward) from the Lord. Anas said: "There (in these lands) were trees and graves of the polytheists, and ruins. The

Messenger of Allah (may peace be upon him) ordered that the trees should be cut, and the graves should be dug out, and the ruins should be levelled. The trees (were thus) placed in rows towards the Qibla and the stones were set on both sides of the door, and (while building the mosque) they (the Companions) sang rajaz verses along with the Messenger of Allah (may peace be upon him):

O Allah: there is no good but the good of the next world,
So help the Ansar and the Muhajirin (emigrants).

3. An illustrated author and great jurist Syed Ameer Ali in his book 'Spirit of Islam' at page 54 narrates that though the owners of the land whereon first Mosque was built by the Holy Prophet in Madina had offered it as a free gift but as they were orphans the Holy Prophet paid them its value. The relevant extract of the 'Spirit of Islam' reads as follows:

A mosque was soon built, in the erection of which Mohhamed assisted with his own hands; and houses for the accommodation of the exiles rose apace. Two brothers, who owned the land on which it was proposed to build the mosque, had offered it as a free gift, but as they were orphans, the Prophet paid them its value.

4. The Sacred Compilation Hadith Sahih Bukhari 3.895 reveals that the Ist wakf in the history of Islam was created by Caliph Umar of the land owned by him in Khaibar after obtaining permission of the Holy Prophet, wherefrom it becomes crystal clear that wakif must be owner of the land. Said Hadith reads as follows:

3.895:

Narrated Ibn 'Umar: 'Umar bin Khattab got some land in Khaibar and he went to the Prophet to consult him about it saying, "O Allah's Apostle I got some land in Khaibar better than which I have never had, what do you suggest that I do with it?" The Prophet said, "If you like you can give the land as endowment and give its fruits in charity." So 'Umar gave it in charity as an endowment on the condition that would not be sold nor given to anybody as a present and not to be inherited, but its yield would be given in charity to the poor people, to the Kith and kin, for freeing slaves, for Allah's Cause, to the travelers and guests; and that there would be no harm if the guardian of the endowment ate from it according to his need with good intention, and fed others without storing it for the future."

5. In the book 'Ibn Battuta Ki Bharat Yatra' Ibn Battuta writes that he was given fund and permission by Sultan Muhamad bin Tughlaq for purchasing 20 villages for the purpose of increasing income of the endowment of Mausoleum of Sultan Kutubuddin. From said fact it becomes crystal clear that the Sultan was not owner of the land of the subject people and he had to purchase land for accretion of said wakf property. In other words private proprietorship of land was in existence during the Sultanate period. Relevant extract from page 158 of the the book 'Ibn Battuta Ki Bharat Yatra' (translated by Madan Gopal published by National Book Trust of India first published in 1933 reprinted in 1997) reads as follows:

१५. मकबरे का प्रबंध

इसके पश्चात् मैं सम्राट कुतुबउद्दीन के समाधि-स्थान के प्रबंध में दत्तचित्त हो गया। यहां पर सम्राट ने इराक के सम्राट गाजां शाह के गुंबद से भी बीस हाथ अधिक ऊँचा (अर्थात् सौ हाथ का) गुंबद निर्माण करने की आज्ञा दी, और इस 'देवोत्तर' संपत्ति की आय बढ़ाने के लिए बीस गांव और मोल लेने की आज्ञा दी। उसमें दलाली के दशमांश का लाभ कराने के विचार से इन गांवों के मोल लेने का कार्य भी मेरे ही सुपुर्द कर दिया गया था।

6. From the *Farman* of Emperor Shah Jahan of 1633-34 AD. it becomes clear that the right of private proprietorship was in existence during the Mughal period and for the purpose of creation wakf of Taj Mahal the Emperor had to acquire land of Raja Jai Singh by giving him other land in lieu of the acquired land. The extract of the *Farman* taken from page 53 and 54 the book Mughal Documents AD.1628-59, Volume-II compiled and translated by S.A.I. Tirmizi and published by Manohar Publishers, Delhi, 1995 Edn., reads as follows:

56. Farman of Shah Jahan addressed to Raja Jai Singh informs the Raja that in lieu of the plot of land acquired for the construction of the mausoleum of Mumtaz Mahal the following four havelis have been granted to him (Jai Singh):

1. Haveli of Raja Bhagwan Das.
2. Haveli of Madhav Singh.
3. Haveli of Rupsi Bairagi
4. Haveli of Chand Singh, son of Suraj Singh.

The zimn on the reverse bears the risala of Afzal Khan and waqia of Makramat Khan (MIM IV. P.165 DLFMN, p.55 CHDKD pp.176-177)

6 Ilahi/1633-34 A.D.

7. In the *Farman* of Emperor Shah Jahan dated 3rd August, 1648 contained in *Nishan of Prince Dara Shukoh*, the then Viceroy of Gujrat it has been held that conversion of temple of Sati Das into mosque by erstwhile Viceroy of Gujrat prince Aurangzeb was in violation of Islamic Law and as it was constructed over the property of another person it could not be considered a mosque according to the inviolable Islamic Law. On the basis of said finding of Law of *Shar* the Emperor directed authorities to hand over the said building to Sati Das for his using the same as his temple. The extract of the *Farman* taken from page 89 of the book Mughal Documents AD.1628-59, Volume-II compiled and translated by S.A.I. Tirmizi and published by Manohar Publishers, Delhi, 1995 Edn., reads as follows:

199. Nishan of prince Dara Shukoh addressed to the subadar, hukkam, and mutasaddis of suba Gujarat, particularly Ghairat Khan, informs that a farman in connection with the temple of Sati Das Jawhari had been formerly issued to Umdatul Mulk Shaista Khan to the effect that Prince Aurangzeb having constructed several mihrabs in the said temple had given it the name of masjid and thereafter Mulla Abdul Hakim had represented to the Emperor that this building, by reason of its being the property of another person, could not be considered a mosque according to the inviolable Islamic Law. The imperial orders were, therefore, issued stating that this building belonged to Sati and that because of its being mihrabi, no obstruction should be caused to the above mentioned person (Sati Das) and that the mihrabs should be removed and the said building be restored to him (Sati Das). Now the royal orders are issued to the effect that the mihrab which the Prince above referred to had constructed there, may be retained and a wall be built close to the mihrab between the temple and mihrab to serve as a screen. It is now ordered that since the Emperor has granted the said temple to Sati Das, he should be left in possession of it as usual and he may worship there according to his creed in any way he likes and no one

should cause any obstruction or hindrance to him in this regard. Some faqirs who have settled there be ejected and Sati Das be relieved of their obstruction and molestation. It has been represented to the Emperor that some of the Bohras have removed and carried away the masala (materials) of the said deohara (temple). If this be a fact the said material should be recovered from them and restored to (Sati Das) but if the said material has been used up, their price be recovered from them and paid to Sati Das. It bears the tughra of Shah Jahan in addition to the tughra and seal of Prince Dara Shukoh. There is a note on the top of the right hand side which begins with the "Huwa" and directs the hukkam to act in conformity with the nishan i ali (JUB IX. PP.39-41)

13 Rajab 22 Julus/1058 A.H./3 August, 1648 A.D.

8. In his book 'Digest of Moohummudan Law' (first part) Neil B. E. Baillie writes that wakif or appropriator must be owner of the subject of the wakf at the time of making it and if a person usurp a piece of land, create wakf and then purchase it from the owner, it would not be a wakf. And if Zimmee gives his mansion for using it as a masjid for Mussulmans, after his death it would become the inheritance of his heirs. Relevant portions of the said book from page 557, 558, 561 & 562 read as follows:

"THE legal meaning of *wukf*, or appropriation, according to Aboo Huneefa, is the detention of a specific thing in the ownership of the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct in charity on the poor, or other good objects."

(Digest of Moohummudan Law, by Neil B.E. Baillie, Second Edn., 1875 published by Smith Elder & Co., London p.557)

"According to the two deciples, *wukf* is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given nor inherited."

(Ibid. p.558)

"But if a *zimmee* should give his mansion as a *musjid*, or place of worship, for Mussulmans, and construct it as they are accustomed to do, and permit them to pray in it, and they should pray in it, and he should then die, it would become the inheritance of his heirs, according to all opinions."

(Ibid. p.561)

"It is also a condition that the thing appropriated be the appropriator's property at the time of the appropriation; so that, if one were to usurp a piece of land, appropriate, and then purchase it from the owner, and pay the price, or compound with him for other property, which is actually delivered up, it would not be a *wukf*."

(Ibid. p.562)

"And if a donee of land should make an appropriation of it before taking possession, and should then take possession, the *wukf* would not be valid."

(Ibid. p.562)

"If the appropriation were made before taking possession, it would not be lawful."

(*Ibid.* p.562)

9. Great jurist Syed Ameer Ali in his book 'Commentaries on Mahommedan Law' extracting the authority writes that the wakif must be lawful owner of the property at the time of creation of wakf. Otherwise a wakf is invalid. Relevant extract from page 225 of the said book reads as follows:

"The subject-matter of the dedication must be the lawful property of the wakif at the time the wakf is made, that is, he must be in a position to exercise dominion over it. Consequently, if a wakf is made by a person of some property which he has un-lawfully acquired, it would be invalid, although he may subsequently purchase it from the lawful owner. So also, when a man makes a *wakf*, for certain good purposes, of land belonging to another, and then becomes the proprietor of it, the (*sic* She) *wakf* is not lawful."

(Mahommedan Law by Syed Ameer Ali, 5th Edn. Reprint 2009, published by Hind Publishing House, Allahabad, p.225)

10. In his book 'Principles of Mahomeddan Law' D.F. Mullah writes that wakif must be owner at the time of dedication. Relevant extract from page 149 of the said book reads as follows:

"146C. Subject of wakf must belong to wakif.—The property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication (s)."

(Principles of Mahomedan Law by D.F. Mullah, 11th Edn., 1938, published by Eastern Law House Publication p.149)

11. In the United Provinces Muslim Waqfs Act, 1936 (Act No.XIII. of 1936) in Section 3(1) the wakf has been defined and in the Statement of Objects and Reasons of the said Act it has been stated that the Muslim Law is full and explicit on the powers, duties and liabilities of Mutawallis in relation to their office. As such the said Act was not aimed to legislate in the matter of personal law. Relevant extract from the Statement of Objects and Reasons as well as Section 3(1) of the said Act are reproduced as follows:

"STATEMENT OF OBJECTS AND REASONS.—...

This I must make clear that this Bill is not intended to deprive the mutawallis of any authority lawfully vested in them nor it aims at defining all the powers, duties and liabilities of the mutawallis in relation to their office. The Muslim Law is full and explicit on these points and it is neither necessary nor desirable to legislate in matters of personal law."

3. In this Act, unless there is anything repugnant in the subject or context—

(1) "Waqf" means the permanent dedication or grant of any property for any purposes recognized by the Musalman law or usage as religious, pious or charitable and, where no deed of waqf is traceable, includes waqf by user, and a waqif means any person who makes such dedication or grant."

12. The Uttar Pradesh Muslim Wakfs Act, 1960 (U.P. Act No. XVI of 1960) in Section 3(11) defines the wakf as follows:

“3.(11). “Waqf” means the permanent dedication or grant of any property for any purposes recognized by the Muslim law or usage as religious, pious or charitable and includes *wakf al-al aulad* [to the extent to which the property is dedicated or granted for any such purpose as aforesaid] and *wakf* by user; and ‘*wakf*’ means the person who makes such dedication or grant.”

PART-XXIII

THE HINDU AND THE MUSLIM KINGS WERE SUBJECT TO LAW OF THEIR RESPECTIVE DHARMA & RELIGION AS SUCH THE EMPEROR BABAR WAS ALSO SUBJECT TO LAW OF SHAR AND HIS ALLEGED ACTION OF ERECTION OF ALLEGED MOSQUE IF ANY DONE IN TRANSGRESSION OF SAID LAW IS VOID:

1. In AIR 1975 SC 2299 (*Indira Nehru Gandhi v. Rajnarain*) the Hon'ble Supreme Court speaking through the Hon'ble Justice M. H. Bag, J. (as His Lordship then was) explaining the law of sovereignty in paragraph 526 to 571, in paragraph 527, 532-534 and 571 held that the Muslim rulers as well as the Hindu rulers were subject to their respective divine sacred law and the law was king of the kings. Relying on said judgment it is submitted that conversion of Sri Ramajanamasthan Temple into an alleged mosque either by the Emperor Babar or Aurangzeb in violation of the Law of Shar makes their such act null and void and such building does not come within the definition of a mosque. Paragraph nos. 527, 532-534 and 571 of the aforesaid judgment read as follows:

“527. I must preface my observations here about the concepts of “sovereignty” and exercise of “sovereign power” between which I make a distinction, with two kinds of explanation. The first kind involves an exposition of a functional or sociological point of view. I believe that every social political, economic, or legal concept or doctrine must answer the needs of the people of a country at a particular time. I see the development of concepts, doctrines, and institutions as responses to the changing needs of society in every country. They have a function to fulfil in relation to national needs. The second type of explanation may be called historical or meant merely to indicate and illustrate notions or concepts put forward by thinkers at various times in various countries so as to appropriately relate them to what we may find today under our Constitution. We have to appreciate the chronology or stages of their development if we are to avoid trying to fit into our Constitution something which has no real relevance to it or bearing upon its contents or which conflicts with these. It must not, if I may so put it, be constitutionally “indigestible” by a constitution such as ours. Of course, it is not a secret that we have taken some of the basic concepts of our Constitution from British and American Constitutions in their most developed stages. That too must put us on our guard against attempts to foist upon our Constitution something simply because it happens to be either a British or American concept of some particular period which could not possibly be found in it today. Therefore, both types of explanation appear to be necessary to an exposition of what may or may not be found in our Constitution.

532. After the break-up of the Roman Empire, there were attempts in medieval Europe, both by the Church and the Kings, to develop spiritual and temporal means for checking wrong and oppression. Quests for the superior or a sovereign power and its theoretical justifications by both ecclesiastical and lay thinkers were parts of an attempt to meet this need. The claims of those who, as vicars of God on earth, sought

to meddle with mundane and temporal affairs and acquire even political power and influence were, after a struggle for power, which took different forms in different countries, finally defeated by European Kings with the aid of their subjects. Indeed these Kings tried to snatch, and, not without success, to wear spiritual crowns which the roles of "defenders of the faith" carried with them so as to surround themselves with auras of divinity.

533. The theory of a legally sovereign unquestionable authority of the King, based on physical might and victory in battle, appears to have been developed in ancient India as well, by Kautiliya, although the concept of a Dharma, based on the authority of the assemblies of those who were learned in the dharmashastras also competed for control over exercise of royal secular power. High philosophy and religion, however, often seem to have influenced and affected the actual exercise of sovereign power and such slight Jaw-making as the King may have attempted. The ideal King in ancient India, was conceived of primarily as a Judge deciding cases or giving orders to meet specific situations in accordance with the Dharma Shastras. It also appears that the actual exercise of the power to administer justice was often delegated by the King to his judges in ancient India. Indeed, according to some, the theory of separation of powers appears to have been carried so far (See: K. P. Jayaswal in "Manu and Yajnavalkya" - A basic History of Hindu Law - 1930 Edn. p. 82) that the King could only execute the legal sentence passed by the Judge.

534. We know that Semitic prophets, as messengers of God, also became rulers wielding both spiritual and political temporal power and authority although to Jesus Christ, who never sought temporal power, is ascribed the saying: "render unto Caesar the things that are Caesar's and to God things that are God's". According to the theory embodied in this saying, spiritual and temporal powers and authorities had to operate in different orbits of power altogether. Another theory, however, was that the messenger of God had been given the sovereign will of God Almighty which governed all matters and this could not be departed from by any human authority or ruler. In the practical administration of justice, we are informed, Muslim caliphs acknowledged and upheld the jurisdiction of their Kazis to give judgment against them personally. There is an account of how the Caliph Omar, being a defendant in a claim brought by a Jew for some money borrowed by him for purposes of State, appeared in person in the Court of his own Kazi to answer the claim. The Kazi rose from his seat out of respect for the Caliph who was so displeased with this unbecoming conduct that he dismissed him from office. (See: Sir A. Rahim's "Muhammadan Jurisprudence", (1958) p. 21).

571. I find that the doctrine of the supremacy or sovereignty of the Constitution was adopted by a Bench of seven learned Judges of this Court in Special Reference No. 1 of 1964, (1965) 1 SCR 413 = (AIR 1965 SC 745) where Gajendragadkar, C. J., speaking for six learned Judges of this Court said (at p. 446) (of SCR) = (at pp. 762-763 of AIR) :

“In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Art. 368 of the Constitution itself makes a provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the said article. That shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution’ itself. Legislators, Ministers, and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.”

2. In AIR 1994 SC 2663 (*N. Nagendra Rao & Co. v. State of Andhra Pradesh*) the Hon’ble Apex Court has held when the law provides for compensation against confiscation, he must be compensated and confiscation cannot effect the right of owner to claim return of the goods. Relying on said judgment it is submitted that when the Law of Shar says that no one can acquire ownership of the property of others by virtue of adverse position but it can be only by purchase, alleged erection of alleged mosque over a Sacred shrine of the Hindus by virtue of forceful occupation makes such building only ordinary private building not the Mosque. Relevant paragraph 8 of the said judgment reads as follows:

8. This sub-section ensures that a person who has been prosecuted or whose goods have been confiscated does not suffer if the ultimate order either in appeal or in any proceeding is in his favour. It is very wide in its import as it statutorily obliges the Government to return the goods seized or to pay the value of the goods if for any reason it cannot discharge its obligation to return it. The circumstances in which the goods are to be returned are;

- (a) an order under S. 6A is modified or annulled by the State Government;
- (b) where the goods were confiscated in consequence of prosecution of the person and he is acquitted;
- (c) and in all these cases where it is not possible for any reason to return the essential commodity seized.

This provision cuts across the argument of the State that where even part is confiscated the person whose goods are seized is not liable to be compensated for the remaining. The section is clear that if only part of the goods are confiscated then the remaining has to be returned. The very first part of the sub-section indicates that where the order of confiscation, is modified in appeal meaning thereby if confiscation is confined to part only the Government is bound to release or return the remaining or pay the value thereof. But what is more significant of this sub-section which widens its reach is the expression, ‘and in either case it is not possible for any reason to return the essential commodity

seized' then, the State shall be liable to pay the market price of the value with interest. The expression, 'for any reason' should be understood in broader and larger sense as it appears from the context in which it has been used. The inability to return, giving rise to the statutory obligation of deeming it as sale to the Government may arise for variety of reasons and extends to any failure on the part of the Government. For instance, the goods might have been sold in pursuance of interim arrangement under S. 6A(2). Or it might have been lost or stolen from the place of storage. The goods might have deteriorated or rusted in quality or quantity. The liability to return the goods seized does not stand discharged by offering them in whatever condition it was. Confiscation of part of the goods thus could not affect the right of owner to claim return of the remaining goods. Nor the owner is bound to accept the goods in whatever condition they are. The claim of the respondent, therefore, that the appellant was bound to accept the goods in whatever condition they were is liable to be rejected.

3. In AIR 1971 SC 1594 (*Union of India. v. Sudhangshu Mazumdar*) the Hon'ble Apex Court has quoted an extract from the *United States v. Juan Prechman*, (1831-34) L.Ed. 604 with approval wherein it has been stated that the modern usage of nations would be outraged if private properties are confiscated or private rights annulled. Relevant paragraph 7 of the said judgment reads as follows:

"7. Dr. Singhvi says that the first premise on which the High Court has proceeded is that as a result of cession it would be competent for the Government of Pakistan to deal with the disputed territory as an absolute owner in complete disregard of the existing rights of the respondents. In other words it has been assumed that the Government of Pakistan will not recognise ownership or other similar rights of the respondents in the lands and properties which belong to them. This Dr. Singhvi claims, is contrary to the rule enunciated by Chief Justice Marshall in *The United States v. Juan Perchman*, (1831-34) 8 L. ed 604 in the following words :

"The modern usage of nations, which has become law, would be violated: that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property, remain undisturbed."

The rule set forth in the Perchman case, (1831-34) 8 L. ed 604 has been followed in over forty American cases and has been accepted as the rule of International law in English, French, German and Italian law*

* Extracts from the *Law of Nations* (2nd Edn. 1953), p. 237, Cf. F. B. Sayre, "Change of Sovereignty and Private Ownership of Land," 12 XII A. J. L L (1918), 475, 481, 495-497"

4. In 1999 (4) SCC 663 (*R.E.M.S. Abdul Hameed v. Govindaraju*) the Hon'ble Apex Court has held that under the Ancient Hindu Law there were two beneficial interests in land: (1) that of the sovereign or his representative, and (2) that of the cultivator or Ryot holding the land. The Ryot's right arose from occupation of the land, thus the grant of an *Inam* do not and could not have touched the cultivator's right in the land, except in rare cases where the grantor also hold the cultivator's interest at the time of the grant. Relying on Said judgment it is submitted that in our country since inception subjects were proprietor of their private properties and the Kings were only entitled for land revenue, Sri Ramajanamasthan was all along and is being owned by the Deity Sri Ramalala as such the right of private property of the Deity cannot be extinguished. Relevant paragraph 4 of the said judgment reads as follows:

“4. The central question in issue is the interpretation of clause (b) Explanation I to Section 2(11) of Act 26 of 1963. Learned counsel for the aforesaid respective appellants, Mr Tripurari Ray and Mr A.T.M. Sampath, Senior Counsel submit on the facts of this case that the disputed land cannot be construed to be “part-village inam estate” to fall within Act 26 of 1963 but is a minor inam to fall under Act 30 of 1963. Before taking up this issue of “part-village inam estate”, it is necessary to look back to the history of inam lands, how it emerged, was recognised, canalised and dealt with through various enactments till it reached the legislative umbrella of both Acts 26 and 30 of 1963. The law relating to the landholdings, agrarian reform, in the Presidency town of Madras, with reference to the landlords and ryots started from the previous century and it is interesting to note a few of the essential features of this agrarian development. The origin of inam tenure is traced back to its grant made by Hindu rulers for the support of temples and charitable institutions, for the maintenance of holy and learned men rendering public service, etc. This practice was followed by the Mohammedan rulers and by British administrators until about a century ago. According to the ancient Hindu law, there were two beneficial interests in land, namely, (1) that of the sovereign or his representative, and (2) that of the cultivator holding the land. The sovereign's right to collect a share of the produce of the cultivated land was known by the name “melvaram”, the share of the ryot or cultivator was known by the name “kudivaram”. The ryot's right arose from occupation of the land. Thus, the grant of an inam did not touch, and could not have touched, the cultivator's right in the land, namely, the kudivaram, except in rare cases where the grantor was also holding the cultivator's interest at the time of the grant.”
5. In AIR 1962 SC 342 (*Sunka Villi Suranna. v. Goli Sathiraju*) the Hon'ble Apex Court has held that where there was no evidence to show that the occupation of the lands by the Ryot commence under the *Zamindar* and there was no evidence as to the terms at which the Ryots or his predecessors were inducted in land. Commencement of the tenancy and the terms thereof were lost in antiquity but the Ryot's rights and his descendants were proved to have continued in possession of the land uninterruptedly till the enactment of the Madras States Land Act, 1908. In the light of the presumption that the *Zamindar* was, unless the contrary was proved, the owner of the *melvaram* and

Ryot the owner of the *kudivaram* the interference was irresistible that the Ryot was the holder of the occupancy rights in the land and thus rights developed upon his successors and the occupancy right in the land were not acquired by virtue of the provisions of Madras States Land Act, 1908. It appears that prior to declaring the land as *nazul* land by the Governor-General in 1959 the Hindus were worshipping in the suit property as such the occupancy rights remained in the hands of the Hindus. Relevant paragraph 17 of the said judgment reads as follows:

“17. To summarise, there is no evidence to show that occupation of the lands by Thammiah commenced under the zamindar and there is no evidence as to the terms on which Thammiah or his predecessors were inducted on the lands: the commencement of the tenancy and the terms thereof are lost in antiquity, but Thammiah and his descendants are proved to have continued in possession of land uninterruptedly till the enactment of the Madras Estates Land Act, 1908. In the light of the presumption that the zamindar is unless the contrary is proved, the owner of the *melvaram* and the ryot the owner of the *kudivaram* the inference is irresistible that Thammiah was the holder of the occupancy rights in the lands and that these rights devolved upon his successors and that the occupancy rights in the lands were not acquired by virtue of the provisions of Madras Act VI of 1908.”

6. In (2001) 4 SCC 713 (*Syndicate Bank. v. Prabha D. Naik*) the Hon'ble Apex Court has held that the Muslim jurisprudence neither recognised prescription nor limitation. Relying on said judgment it is Submitted that as Hindu Endowment was existing prior to acquisition of Kingship by the Emperor Babur and said ownership of the Deity existed till the day of confiscation of the rights of the proprietors in land in the year 1959 by the British government which right of the Deity again revived when the State of Uttar Pradesh gave up its said right by filing written statement in the instant Suit. As such the said sacred shrine of the Hindus is not liable to be declared as a mosque it is most respectfully Submitted. Relevant paragraph 6 of the said judgment reads as follows:

“6. Incidentally, it may be noted that though the old Hindu law recognised both prescription and limitation but Muslim jurisprudence recognised neither of them. The new Law of Limitation in terms of the Limitation Act of 1963 however, does not make any racial or class distinction since both Hindu and Muslim laws are amenable to the Law of Limitation as is presently existing in the statute-book (see in this context *B.B. Mitra's Limitation Act*, 20th Edn.).”

- In AIR 1968 SC 683 (*V. D. Dhanwatey. v. Commissioner of Income Tax, M. P., Nagpur & Bhandara*) the Hon'ble Supreme Court held that while interpreting an ancient text, the Courts must give them a liberal construction to further the interest of the society by wisely interpreting the original texts in such a way as to bring them in harmony with the prevailing conditions. Relying on said judgment it is submitted that the *Sthandil* i.e. Sri Ramjanmasthan which has been recognized by the scriptures a means of conferring merit upon the devotees and granting salvation to them be recognized as Juridical entity and not mere property in crude sense to do justice in the greater interest of the

citizens of India in general and the Hindu and Muslim community in particular to pave the way of permanent peace it is with due respect submitte. Relevant paragraph 31 of the said judgment reads as follows:

“31. Law is a social mechanism to be used for the advancement of the society. It should not be allowed to be a dead weight on the society. While interpreting ancient texts, the courts must give them a liberal construction to further the interests of the society. Our great commentators in the past bridged the gulf between law as enunciated in the Hindu law texts and the advancing society by wisely interpreting the original texts in such a way as to bring them in harmony with the prevailing conditions. To an extent, that function has now to be discharged by our superior courts. That task is undoubtedly a delicate one. In discharging that function our courts have shown a great deal of circumspection. Under modern conditions legislative modification of laws is bound to be confined to major changes. Gradual and orderly development of law can only be accomplished by judicial interpretation. The Supreme Court’s role in that regard is recognised by Article 141 of our Constitution.”

8. In AIR 2008 SCW 1224 (*Dist. Basic Education Officer & Anr. v. Dhananjay Kumar Sukla & Anr.*) the Hon’ble Supreme Court has held that the rules of pleadings do not apply to question of law and new plea on question of law can be raised before the Supreme Court even it was not raised before the High Court. Relying on said judgement it is humbly submitted that the questions of law which has been raised during the argument are sustainable in the eye of law and needed to be decided for doing complete justice between the parties who are representing two major community of India. Relevant paragraph 14 of the said judgment reads as follows:

“14. Rules of pleading contained in the Code of Civil Procedure do not cover questions of law. If a fact stands admitted the same in terms of Section 56 of the Indian Evidence Act need not be proved. Only because such a question was not allegedly raised before the High Court, this Court could not shut its eyes to the legal position. Yet again only because an illegality has been committed, this Court would not allow its perpetration. Respondent’s father was on leave for a temporary period. He thereby did not cease to be the Manager of the school. It is apparent that he went on leave only for defeating the statutory provisions. Such an act amounts to fraud on the administration.”

PART- XXIV

RELEVANT FACTS CONTAINED IN GAZETTEERS ARE ADMISSIBLE EVIDENCE UNDER THE PROVISIONS OF THE INDIAN EVIDENCE ACT, 1872 AS SUCH THE FACTS RELIED ON FROM THE GAZETTEERS REFERRED EARLIER ARE ADMISSIBLE EVIDENCE:

1. In AIR 1951 SC 288 (*Sukdeo Singh. v. Maharaja Bahadoor of Gidhaur*) the Hon'ble Supreme Court has held that the gazetteer is an official document of some value, as it is compiled by experienced official with great care after obtaining the facts from official records. Relevant paragraph 10 of the said judgment reads as follows:

“10. In the case of Fulbati Kumari (supra), to which reference has been made, there was an extract quoted from the Bengal District Gazetteer, Vol. XVII at p. 168, which runs as follows:

“About 1774 the lawless state of this tract led the British to place it in charge of Captain James Browne, who settled the estates with the ghatwals with two exceptions. These two exceptions were Dumri and Mahesri which were settled directly with the proprietors, the story being that the ghatwal tenure holders fled at the approach of Captain Browne their reputation as dacoits and brigands being too strong for them to face a Govt. officer without fear of the consequences. In the case of Dumri however, the Ghatwals finding that in their absence a settlement had been made of their tenure, returned and obtained a squad settling it with them under the Raja of Gidhaur. Of the estates settled with ghatwals only two are now held by their descendants, viz., Tilwa and Kewal. The others have passed into the hands of the Maharaja of Gidhaur, Chetru Rai, Akleswar Prasad and others of Rohini.” ‘

The statement in the District Gazetteer is not necessarily conclusive, but the Gazetteer is an official document of some value, as it is compiled by experienced officials with great care after obtaining the facts from official records. As Dawson-Miller C. J. has pointed out in Fulbati's (supra) case, there are a few inaccuracies in the latter part of the statement quoted above, but so far as the earlier part of it is concerned, it seems to derive considerable support from the documents to which reference has been made.”

2. In AIR 1995 SC 167 (*Bala Shankar-Maha Shankar Bhattajee. v. Charity Commissioner, Gujrat*) the Hon'ble Supreme Court has held 'gazette' (SIC) 'gazetteer' is admissible under Section 35 read with Section 81 of the Indian Evidence Act, 1872 for being official record evidencing public affairs and the Court may presume their contents as genuine. The statements contained therein can be taken into account to discover the historical materials contained therein and facts stated therein is evidence under Section 45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question. Relevant paragraph 22 of the said judgment reads as follows:

“22. The contention of Sri Yogeshwar Prasad that the Asstt. Charity Commissioner has failed to prove that Kalika Mataji temple is a public

trust; contrarily the evidence on records, namely the 'Will' of Bai Diwali, widow of N. Girijsankar, establishes that the temple and its properties were always treated as private properties. It would get fortified and gets corroborated by decrees in Civil Suit No. 439/1985, one of the legatees sought to annul the Will in Exhibits 10, 59 and the decree in that behalf. The Civil Suits Nos. 353/93, Ex. 24 and the Civil Suit No. 439 of 1885, Ex. 26 and the Civil Suits Nos. 904 of 1903 and 910 of 1903, Ex. 52 and Ex. 54, Civil Suit No. 912 of 1903, Ex. 55 would establish that the appellant's family had always treated the temple and the lands attached to temple as private properties. It has also been further contended that the entry into the temple was subject to permission and the devotees were not allowed to have Pooja, but have Darshan only. These circumstances have duly been taken into consideration by the District Judge while the High Court had not considered them in proper perspective. We find no force in the contention. It is seen that the Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under S. 35 read with S. 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the Court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under S.45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question, though may not be treated as conclusive evidence. The recitals in the Gazette do establish that Kalika Mataji is on the top of the hill. Mahakali temple and Bachra Mataji on the right and left to the Kalika Mataji. During Moughal rule another Syed Sadar Peer was also installed there, but Kalika Mataji was the chief temple. Hollies and Bills are the main worshipers. On full Moon of Chaitra (April) and dussehra (in the month of October), large number of Hindus of all classes gather there and worship Kalika Mataji, Mahakali, etc. After the downfall of Moughal empire, Marathas took over and His Highness Scindia attached great importance to the temple. One of the devotees in 1700 offered silver doors. The British annexed the territory pursuant to the treaty between Her Majesty's Government of India and His Highness Scindia on the 12th December, 1860. A condition was imposed in the treaty for continued payment of fixed cash grants to all the temples from the Treasury and that British emperors accepted the condition. Regular cash grants of fixed sums were given to all the temples by Scindias and British rulers, as evidenced by Exhibits 27, 28, 29 and 30. The historical statement of noted historian, stated by the High Court, by name M.S. Commissionaria in his Vol. 1 of 1938 Edition corroborates the Gazette in the material particulars, which would establish that the temple was constructed on the top of the hill around 14th century and the people congregate in thousands and worship, as of right, to Kalika Mataji and other deities. R.N. Jogelkar's Alienation manual brought up in 1921 in the Chapter 5 Devasthanas also corroborates the historical evidence. It is true that Bai Diwali in her Will, Ex. 22 treated the temple and the properties to be private

property and bequeathed to her brother and the litigation ensued in that behalf. At that time, as rightly pointed out by the High Court, the concept of public trust and public temple was not very much in vogue. Therefore, the treatment meted out to these properties at that time is not conclusive. On the other hand the fixed cash grants given by the Rulers Scindias and the successor British emperors, the large endowment of lands given to Kalika Mataji temple by the devotees do indicate that the temple was treated as public temple. The appropriation of the income and the inter se disputes in that behalf are self serving evidence without any probative value. Admittedly, at no point of time, the character of the temple was an issue in any civil proceedings. All the lands gifted to the deity stand in the name of the deities, in particular large extent of agricultural lands belong to Kalika Mataji. The entries in Revenue records corroborated it. The Gazette and the historical evidence of the temple would show that the village is the pilgrimage centre. Situation of the temples on the top of the hill away from the village and worshipped by the people of Hindus at large congregated in the thousands without any let or hindrance and as of right, devotees are giving their offerings in large sums in discharge of their vows, do establish that it is a public temple. It is true that there is no proof of dedication to the public. It is seen that it was lost in antiquity and no documentary evidence in that behalf is available. Therefore, from the treatment meted out to the temple and aforesaid evidence in our considered view an irresistible inference would be drawn that the temple was dedicated to the Hindu public or a section thereof and the public treat the temple as public temple and worship thereat as of right. It is true that there is evidence on record to show that there was a board with inscription thereon that "no entry without permission" and that only Darshan was being had and inside pooja was not permitted. But that is only internal regulation arranged for the orderly Darshan and that is not a circumstance to go against the conclusion that it is a public temple. Enjoyment of the properties and non-interference by the public in the management are not sufficient to conclude that the temple is a private temple. It is found by the District Court and the High Court that the appellants are hereditary priests and when the public found that they are in the management of the properties they obviously felt it not expedient to interfere with the management of the temples. It is seen that the High Court considered the evidence placed on record and has drawn the necessary conclusions and inferences from the proved facts that Kalika Mataji temple is a public temple. It is a finding of fact. As regard the oral evidence the High Court rightly appreciated the evidence and it being a question of fact, we find no error in the assessment of the evidence by the High Court."

3. Be it mentioned herein that the 'gazette' is an official publication which contains government notifications, list of public appointments and honours legal notices etc. which are presumed to be genuine. While 'gazetteer' is a publication of official guarantee which contains geographical, historical, political, custom etc. of a particular District, State or Nation. The dictionary meaning of 'gazette'

and 'gazetteer' as given in Mitra's Legal and Commercial Dictionary, 6th Edition, 2006 published by Eastern Law House on page 383 as follows:

"Gazette.—It is a publication of an official guarantee which contains government notifications, lists of public appointments and honours, legal notices, etc. which are presumed to be genuine.

The official publication of news of all kinds, the government desires to make known to the public. [General Clauses Act, s.3(39)]

"Gazetteer.—A dictionary which contains a historical account, or the general description of any place, district or province; a dictionary of geographical names."

4. In AIR 1986 SC 1272 (*Umaji Keshao Mishram. v. radhika Bai*) the Hon'ble Apex Court has held that 'gazetteer of Bombay Province' in 28 volumes published in 1982-84 under government orders; the 'gazetteer of Bombay city and island' in 3 volumes compiled under government orders and published in 1909; have been found source of much useful information. Relevant extract from paragraph 35 of the said judgment reads as follows:

"35. It is, therefore, necessary to see the jurisdiction and powers which the High Court for the Province of Bombay possessed immediately prior to the commencement of the Constitution, namely, immediately before January 26, 1950, and to ascertain whether the powers specified in Articles 225, 226 and 227 of the Constitution formed part of its existing jurisdiction or were conferred for the first time upon that High Court when it became the High Court for the pre-Reorganization State of Bombay on the Constitution coming into force. This involves tracing in brief the origin and development of judicial institutions and administration of justice in the former Province of Bombay. Apart from the various Charters and Letters Patent granted by the British Crown and the Statutes passed by the British Parliament, much useful information in this regard can be gathered from other sources, particularly "The Imperial Gazetteer of India" published under the authority of the Secretary of State for India in Council; "Gazetteer of the Bombay Presidency" in twenty-eight volumes published in 1882-84 under Government orders; "The Gazetteer of Bombay City and Island" in three volumes compiled under Government orders and published in 1909; and books such as "The Administration of Justice in British India" by William H. Morley published in 1858, Herbert Cowell's Tagore Law Lectures entitled "History and Constitution of the Courts and Legislative Authorities in India" published in 1872, "Bombay in the Making Being Mostly a History of the Origin and Growth of Judicial Institutions in the Western Presidency, 1661-1726" by Phiroze B.M. Malabari published in 1910, "First Century of British Justice in India" by Sir Charles Fawcett (a former Judge of the Bombay High Court) published in 1934 under the patronage of the Secretary of State for India in Council, M. C. Setalvad's Hamlyn Lecture on "The Common Law in India" published in 1960, "Famous Judges, Lawyers and Cases of Bombay A Judicial History of Bombay during the British Period" by P.B. Vacha published in 1962, "City of Gold The Biography of Bombay"

by Gillian Tindall published in 1982, and "The East India Company's Sadar Courts 1801-1834" by Sir Orby Mootham (former Chief Justice of the Allahabad High Court) published in 1982. A judicial decision in which much valuable information can be found is the judgment of Westropp, J., who spoke for the Court in the case of *Naoroji Beramji v. Henry Rogers* (1866-67) 4 Bom HCR 1."

5. In AIR 1966 SC 1119 (*Shastri Yajnapurushdaji. v. Muldas Bhundardas Vaishya*) in respect of ceremony of initiation of the sect of *Satsangis* the Hon'ble High Court has quoted an extract from Gazetteer of the Bombay Province to judge their custom. Relevant paragraph 49 of the said judgment reads as follows:

"49. The Gazetteer of the Bombay Presidency has summarised the teachings embodied in the *Shikshapatri* in this way:-

The book of precepts strictly prohibits the destruction of animal life; promiscuous intercourse with the other sex; use of animal food and intoxicant liquors and drugs on any occasion, suicide, theft and robbery; false accusation against a fellow-man; blasphemy; partaking of food with low caste people; caste pollution; company of atheists and heretics, and other practices which might counteract the effect of the founder's teachings (14)."

(14) Gazetteer of the Bombay Presidency, Vol. IX, Part I, Gujrat Population, 1901, p. 537"

It is interesting to notice how a person is initiated into the sect of *Satsangis*. The ceremony of initiation is thus described in the Gazetteer of the Bombay Presidency :-

"The ceremony of initiation begins with the novice offering a palmful of water which he throws on the ground at the feet of the Acharya saying: I give over to Swami Sahajanand my mind, body, wealth, and sins of (all) births, 'Man', tan, dhan, and janmana pap. He is then given the sacred formula 'Sri Krishna twam gatirmama'. Shri Krishna thou art my refuge. The novice then pays at least half a rupee to the Acharya. Sometimes the Acharya delegates his authority to admit followers as candidates for regular discipleship, giving them the Panch Vartaman, formula forbidding lying, theft. Adultery, intoxication and animal food. But a perfect disciple can be made only after receiving the final formula from one of the two Acharyas. The distinguishing mark, which the disciple is then allowed to make on his forehead, is a vertical streak of Gopichandan clay or sandal with a round redpowder mark in the middle and a necklet of sweet basil beads (15)."

(15) Gazetteer of the Bombay Presidency, Vol. IX, Part I, Gujrat Population, pp. 538-39"

6. In AIR 1968 SC 1413 (*Gopal Krishnaji Ketkar. v. Mohamed Haji Latif*) the Hon'ble Apex Court has quoted an extract from Gazetteer of Bombay Province in respect of tomb of a Muslim saint and Hindu Prince for its consideration of facts. Relevant paragraph 4 of the said judgment reads as follows:

"4. It is necessary at this stage to set out the origin and history of the Dargah. The Dargah has been in existence for over about 700 years.

Its origin is lost in antiquity but the Gazetteer of the Bombay Presidency tells us that the tomb is that of a Muslim saint who came to India as an Arab missionary in the thirteenth century. According to tradition, there are two tombs in the Dargah in one of which is the dead body of a Hindu princess and in the other tomb the dead body of the Muslim saint. The fame of the saint was at its height when the English made their appearance at Kalyan in 1780. As they only stayed for two years, their departure in the year 1782 was ascribed to the power of the dead saint. The Peshwas were then in power in that region and after the departure of the English they sent a thanks offering under the charge of one Kashinath Pant Ketkar, a Kalyan Brahmin. It is said that the offering sent by the Peshwas was a pall of cloth of gold trimmed with pearl, and supported on silver pasta. The tomb was in disrepair and Kashinath started to repair it and according to tradition was miraculously assisted by the dead saint who, without human aid, quarried and dressed the large blocks of stone which now cover the tomb. It appears that Kashinath was not content to repair the tomb. He also wanted to manage it and this led to a dispute with Kalyan Muslims who resented Brahmin management of a Muslim shrine. Matters came to a head in 1817 and the dispute came before the Collector who declared that the dead saint should settle the affair and that the only way of ascertaining the saint's wishes was by casting lots. This was done and three times the lot fell on the representative of Kashinath and so the matter ended and Kashinath's representative was proclaimed guardian of the tomb."

7. Be it mentioned herein that as it appears from the above referred three judgments being AIR 1986 SC 1272; AIR 1966 SC 1119 and AIR 1968 SC 1413; the Hon'ble Court in place and stead of 'Gazetteer of Bombay Province' has mentioned 'Gazette of Bombay Province'.
8. In AIR 1967 SC 256 (*Mahant Shrinivas Ramanuj Das. v. Surjanarayn Das*) in paragraph 25 of the said judgment, the Hon'ble Supreme Court quoting with approval the facts from 'Puri Gazetteer' has held that the gazetteers can be consulted in matters of public history and statement in such gazetteer can be relied on as providing historical material, practice followed by Math and its head. Relevant paragraph Nos. 25 and 26 of the said judgment read as follows:

"25. The history of the Emar Math, according to the passage in the Puri Gazetteer, fits in with our finding. The High Court has relied on what has been stated in the Puri Gazetteer of O'Malley of 1908, at pp. 112-118. The relevant portion of the passage relied on is the following:

"No account of Jagannath worship would be complete without some account of the Maths in Puri. Maths are monastic houses originally founded with the object of feeding travellers, beggars and ascetics of giving religious instruction to chelas or disciples, and generally of encouraging a religious life. The heads of these religious houses who are called Mahants or Mathadharis are elected from among the chelas and are assisted in the management of their properties by Adhikaris who may be described as their business managers. They are generally celibates but in certain Maths married men may hold the office..

Mahants are the gurus or spiritual guides of many people who present the Maths with presents of money and endowments in land. Thus the Sriramdas or Dakshinaparwa Math received rich endowments from the Mahrattas its abbot having been the guru of the Niahhatta Governor While the Mahant of Emar Math in the eighteenth century who' had the reputation of being a very holy ascetic, similarly got large offerings frolic his followers. Both Saiva and Vaishava Maths exist in Puri. The lands of the latter are known as Amruta Manohi (literally nectar food), because they were given with the intention that the proceeds thereof should be spent in offering bhoga before Jagannath and that the Mahaprasad thus obtained should be distributed among pilgrims, beggars and ascetics; they are distinct from the Amruta Manohi lands of the Temple itself which are under the superintendence of the Raja. In 1848 Babu Brij Kishore Ghose roughly estimated the annual income of 28 Maths from land alone at Rs. 1,45,400 and this income must have increased largely during the last sixty years.

There are over 70 Maths in Puri Town. The Chief Saiva Maths are located in the sandy tract near Swargadwar, viz., Sankaracharya Math with a fine Library of old manuscripts and Sabkarananda Math which has a branch at Bhubaneswar. Most of the Maths are naturally Vaishnava. The richest of the latter are Emar, Sriramdas and Raghavadasa the inmates of which are Ramats or followers of Ramananda."

26. It is urged for the appellant that what is stated in the Gazetteer cannot be treated as evidence. These statements in the Gazetteer are not relied on as evidence of title but as providing historical material and the practice followed by the Math and its head. The Gazetteer can be consulted on matters of public history."

9. In AIR 1975 SC 706 (*State of Rajasthan. v. Sajjanlal Panjawat*) the Hon'ble Supreme Court of India has quoted with approval an extract from the Imperial Gazetteer of India in respect of famous giant temple. Relevant paragraph 12 of the said judgment reads as follows:

"12. Apart from a copy of the fireman of Emperor Akbar produced by the respondents to show that Shri Rikhabdevji temple is a Swetamber Jain temple, the authenticity of which has been disputed by the State, there are other documents from which it appears indisputable even as was represented by the State and its predecessors that Shri Rikhabdevji temple is a Jain temple. Annexure-26 -The Imperial Gazetteer of India, Vol. XXI (New Edition 1908 pp. 168-169) describes it as "The famous Jain temple sacred to Adinath or Rakhabhath". It further states that it is annually visited by thousands of pilgrims from all parts of Rajputana and Gujarat, and that it is difficult to determine the age of this building, but three inscriptions mention that it was repaired in the fourteenth and fifteenth centuries. There can be no doubt that it is an ancient temple, though it is not possible to say when and by whom the idols were consecrated. We find as late as in 1958 that Annexure 30 - a Calendar printed and published by the Government of Rajasthan - has a photo of Shri Rikhabdevji temple under which there is a caption

“UDAIPUR KE PAS RIKHABDEVJI KA PRASIDH JAIN MANDIR” i. e. famous Jain temple of Rikhabdevji near Udaipur. Annexure 17 is a notification issued by the Mewar Government on Chait Sukla 7 Monday 1982 corresponding to April 19, 1926 A.D. with the heading “Unique Angi Utsav in Shri Dhulevnagar”. In it Shri Keshariyanathji Maharaj is described as a holy Jain Tirath which was managed previously by Udaipur Nagar Seth and Seth Jorawarmalji. We are not for the present concerned with the statement contained there in about the misappropriation of the money of the deity in Samvat Year 1934 But this document also shows that the State of Mewar describes it as a holy Jain Tirath. Annexures 2, 3, 4, 6, 7A, 7B and 7C show that some embezzlement of the temple funds was suspected in Samvat Year 1933 (about year 1875-76 AD.) as a result of which one Molvi Abdul Rehman Khan was deputed by the State of Udaipur to make enquiry and check the accounts. It appears that while this enquiry was - proceeding, one Bhandari Jawanji Khem Raj complained against that Molvi for forcibly breaking open the lock of the Bhandar and taking away the account books and other papers. In that connection he described the temple of Shri Rikhabdevji Maharaj as belonging to the Jain Sangh. Annexure 9 dated January 27. 1878, is a notification of the Government of Udaipur State for the information of the pilgrims and the devotees of Shri Rikhabdevji stating that Bhandaries were removed due to their mismanagement of the temple affairs and that a Committee consisting of five respectable Oswal Mahajans devotees of Shri Rikhabdevji, was appointed. Annexure 10 dated November 22, 1878, is a notice issued by the members of the Committee to dispel doubts about the action taken by the Ruler of the State in appointing a Committee for the management of the temple. It also mentions that- the management has been assigned to a Committee of five or seven big Sahukars who follow Jain religion and lead a religious life. Annexure 24 dated May 29, 1886, is a copy of the report made by Mehta Govind Singh Hakim Magra (an officer having both judicial and magisterial powers) to Mahkama Khas, Udaipur, on an application submitted by some Digamber Jains objecting to the raising of Dhawaja i.e. flag over the ‘Jainalaya’ by the Swetambar Jains. In that report it was stated that the temple was a Swetamber Jain temple. Annexure 21 dated July 19, 1907, shows that on a complaint that some people had allowed low caste people to perform Puja of Shri Rikhabdevji by taking some illegal gratification, the matter was referred by the officer of the Devasthan Bhandar to Jain Muni Paniyas Nem Kushalji as to what steps be taken for purification of the temple and the reply given by the said Muni. Annexure 28 dated Kartik Sudi 10 Samvat 1979 (1922 A D.) is a copy of the report of the Devasthan Department to Mahkama Khas, Udaipur State, stating that ‘Naivedya’ should not be offered to the deity Shri Rikhabdevji as neither the Committee no; the Jain Sangh nor the Acharyas of the Jain Sangh are in favour of it, and that the new practice of offering ‘Naivedya’ for the first time is uncalled for. On this report, the Mahkama Khas ordered that the Devasthan be informed that there is no necessity of offering ‘Naivedya’. Annexure 29 dated Samvat 1889 (Sak 1759) (1833 A.D.) is a copy of inscriptions engraved

on the main gate in which there is a reference to the performance of the ceremony of Dhwaja-Danda on the temple of Shri Rikhabdevji Maharaj. All these documents, there being no document to the contrary filed by the State of Rajasthan, clearly show that Shri Rikhabdevji temple is a Jain temple.”

10. In AIR 1960 SC 148 (*Shubnath Deogam. v. Ram Narain Prasad*) the Hon’ble Apex Court has quoted with approval an extract from the District Gazetteer in respect of religious practices and sentiments of the *Adibasis*. Relevant paragraph 14 of the said judgment reads as follows:

“14. It also appears from the district Gazetteer quoted in the judgment of the Tribunal that according to the belief of the ‘Hos’:

“All the spirits if not by nature malignant - and they generally are malignant - require continual propitiation by means of sacrifices, the belief being that unless such offerings are made to them, they are a power for evil. Illness, for instance, is usually regarded as due to the influence of some Bonga; and the more serious and continued the disease, the greater the value of the animal that must be sacrificed. First, they sacrifice a fowl, and then if the offering does no good a goat. If a goat fails to procure relief, they increase the size of the sacrificial animal, immolating one after the other, a sheep, a calf, a cow and a buffalo to appease the ill will of the spirit.....”.

The facts stated in the District Gazetteer have been accepted by the Courts below as setting out correctly the religious practices and sentiments of the *Adibasis*.”

11. In AIR 1959 SC 1073 (*State of Bihar. v. Bhabapritananda Ojha*) the Hon’ble Apex Court has extracted facts from the Bihar District Gazetteer placing the history of Shri Baidyanath temple. Relevant paragraphs 2 and 3 of the said judgment read as follows:

“2. For the purposes of this appeal it will be necessary to refer to some earlier litigation about this temple. The history of this temple, it is not disputed, goes back to remote antiquity. According to Hindu tradition referred to in the Siva Purana and Padma Purana, extracts from which, with translations, are given by Dr. Rajendra Lal Mitra in his paper on the Temples of Deoghar (see Journal of the Asiatic Society of Bengal, Part 1, 1883, quoted in the Bihar District Gazetteer relating to Santal Parganas, 1938 edition pp. 373-376), the origin of the temple is traced to the Treta Yuga, which was the second age of the world by Hindu mythology. Side by side with Hindu tradition, there is a Santal tradition of the origin of the temple given by Sir William Hunter (see the Annals of Rural Bengal, p. 191; Statistical Account of Bengal Vol. XIV, p. 323). But these materials afford no evidence as to when and by whom the idol was established or the temple was built.

3. The temple sheltering the “lingam” and dedicated to Mahadeva stands in a stone-paved quadrangular courtyard. The courtyard contains eleven other temples, smaller in size and of less importance than that of Baidyanath. Pilgrims visit the temples in large numbers and make

offerings of flowers and money in silver or gold; rich people offer horses, cattle, palaquins, gold ornaments and other valuables and sometimes, rent-free land in support of the daily worship. There is a high or chief priest (Sardar Panda) who it appears used to pay a fixed rent to the Rajas of Birbhum during the Muhammadan regime, and the administration of the temple was then left entirely in the hands of the high priest. It may be here stated that about 300 families of "pandas", who belong to a branch of Maithil Brahmins, were attached to the temple and earned their livelihood by assisting pilgrims in performing the various ceremonies connected with the worship of the God. When the British rule began, it was decided to take over the management of the temple, and with this object an establishment of priests, collectors and watchmen was organised in 1787 at Government expense. The revenue soon fell off, as the chief priest beset the avenues to the temples with emissaries, who induced the pilgrims to make their offerings before approaching the shrine. (See the District Gazetteer, *ibid*, p. 383). In 1791 Government relinquished its claim to a share of the offerings and entrusted the management of the temple to the head priest on his executing an agreement to keep the temples in repair and to perform all the usual ceremonies. This agreement was entered into by Ram Dutt the (ancestor of the present respondent), then high priest of the temple, and Mr. Keating who was then Collector of the district. According to Mr. Keating the income of the temple in 1791 consisted of the offerings of the proceeds of 32 villages and 108 bighas of land which he estimated at Rs. 2,000 a year; some years later the total income was estimated at Rs. 25,000 a year. Under the system introduced by the agreement of 1791, the mismanagement of the temple was a source of constant complaint; the temple and "ghats" were frequently out of repair and the high priest was charged with alienating villages from the temple and treating his situation as a means of enriching himself and his family. On the death of the high priest in 1820 a dispute over the succession arose between an uncle and a nephew. The nephew Nityanand was eventually appointed, but neglected to carry out the terms of his appointment. Finally, Nityanand was charged with malversation of the funds and the uncle Sarbanand was appointed in his stead in 1823. There was a faction which was opposed to Sarbanand's retention in office and asked for Government interference in the internal management of the temple. In 1835 Government declined all interference in the matter and the parties were left to have recourse to the established Courts of law. Sarbanand died in 1837 and Iswaranund Ojha, son of Sarbanand Ojha, was subsequently elected Sardar Panda. Iswaranund was succeeded by his grand-son, Sailajanund Ojha."

12. In AIR 1954 SC 575 (*Choote Khan. v. Mal Khan*) the Hon'ble Apex Court has relied and quoted facts from Gazetteer of Gurgaon District. Relevant paragraphs 4 and 6 of the said judgment reads as follows:

"4. The parties are Meos and the land in dispute is situate in village Manota in Tehsil Ferozepore Jhirka in Gurgaon District. According to the Gazetteer of Gurgaon district (1910) the Meos owned nearly the

whole of the Ferozepore Tehsil and various other villages in Gurgaon. They are divided into several sub-tribes, and these sub-tribes possess a strong feeling of unity and the power of corporate action. It was stated that

“ in the Mutiny the members of each sub-division generally acted together and district officers are advised to keep themselves informed of the names and characters of the men, who from time to time possess considerable influence over their fellow-tribesmen.” (P. 60).

6. It is common ground that the property was originally granted in 1822 A.D. to Dalmir by Nawab Ahmad Bakhsh Khan Rais of Ferozepore Jhirka. The grant is not in writing and there is no contemporaneous record which could throw any light on its terms. Dalmir claimed to be the sole grantee with full proprietary rights. A number of documents are attached to the Settlement record of 1963. They are important as showing how the property was dealt with by the Settlement authorities from time to time and the State of Revenue records. The earliest document on record appears to be an agreement dated September 28, 1861, which is incorporated in paragraph 18 of the Wazib -ul- arz of village Manota. It says that the tenure of the village is zamindari. Dalmir is entitled to profit and liable for loss in respect of the entire village. The other biswadars are owners of the produce of the land cultivated by them but they pay no revenue. This it is stated, is signed in token (P. 35: D. 11). This document is signed in token of verification by Dalmir Lamberdar, Dilmore, Alif Khan Biswadar, and Phusa Biswadar, who are described as proprietors. Phusa, we are told, is the alias of Chhinga.

There is a report of Mr. John Lawrence (later Lord Lawrence) Settlement Officer referred to in the Gazetteer which says that the arrangement then in vogue was that a few owners shared the profit and loss of the land Revenue and the others were exempted from responsibility. Manota was one of the few villages which continued to follow the system (P. 179)”

13. In AIR 1969 All 43 (G.S. Chooramoni. v. State of Uttar Pradesh) the Hon'ble Uttar Pradesh High Court has relied on a district gazetteer in respect of proprietary rights of the government lessees. Relevant paragraph 12 of the said judgment reads as follows:

“12. In 1965 the State Government appears to have departed from the initial proclaimed purpose that the Thekedari Abolition Act was to apply to the nine districts mentioned by the Hon'ble Revenue Minister. By a notification No. 1683/ IC-340C-65, the State Government extended the provisions of the Act to the areas comprising the district of Naini Tal, with effect from June, 26, 1965. The same day by another notification no. 1688 (ii) IC-340C-65, the State Government ordered that under section 3 of the Thekedari Abolition Act, all leases in respect of Government Estate in 53 Mustajiri villages of the Tarai and Bhabar Government Estate, district Naini Tal, shall with effect from 1-7-1965 be determined. Mustajiri means zamindari. In these villages the Government lessees had proprietary rights (vide District Gazetteer Vol.

34, p. 128). Then, all leases in the Government Estates of 35 other villages in the Tarai and Bhabar area were determined by the impugned notification dated 30th June, 1966. These are non-mustajiri or kham villages, that is, directly managed; the rent being in cash, at Bighawar rate. For the petitioners it was contended that though the leases were terminated under the Thekedari Abolition Act, but the Zamindari Abolition Act has not been extended to the Government Estates in these 35 villages, I asked the learned counsel appearing for the State to verify this and make a statement. The hearing was adjourned to enable him to obtain instructions. Learned counsel then confirmed the fact stated for the petitioners."

14. In AIR 1983 MP 75 (*Ramdas. v. Vaishnudas*) the Hon'ble Madhya Pradesh High Court has relied on and quoted relevant facts from Madhya Pradesh District Gazetteer of Bilaspur District in respect of historicity and practices followed by Sheorinarayana Math. Relevant paragraph 5 of the said judgment reads as follows:

"5. Before proceeding further, it is necessary to mention briefly the history of the Sheorinarayana Math. The Math is situated in the village Sheorinarayan, 62.04 kilometers from Bilaspur on the left bank of Mahanadi. It is an ancient Math and us a well-known place of pilgrimage. The entire Chhatisgarh area which includes the District of Bilaspur was ruled by the Kalchuri clan of Rajputs from the 9th century A.D. to the 18th century A.D. The capital of these rulers was at Ratanpur which is at short distance from Bilaspur. The Kalchuries of Ratanpur were all descendants of the Kalchuries of Chedi or Dehala with their capital at Tripuri near Jabalpur. Kalchuries belong to Haihaya race claiming descent from Kartavityarjuna of the Epic and the Puranic fame and are also referred to as Haihayas : (Madhya Pradesh District Gazetteer of Bilaspur District, pp. 56 to 66). The popular belief which is also adverted to in the plaint is that the temple of Narayana which is the principal temple of the Math was constructed during the reign of Jajalladeva II who ruled from 1165 A.D. to 1168 A.D. There are two stone inscriptions which are important for finding out as to when the temple of Narayana in the Math was built. The first inscription which is of the Kalchuri year 898 is incised on the pedestal of the statue of a male person in a small shrine in the courtyard of the temple of Narayana. The corresponding English date of this inscription is 9th Sept. 1146 A.D. The object of the inscription is to record that the statue is of a warrior named Sangramasimha the son of Balesimha and Ananadevi. The praise which is here lavished in the inscription is wholly conventional and has no historical importance: (See Corpus Inscriptionum Indicarum (Inscriptions of the Kalachuri-Chedi Era) Vol. IV, Pt. II, pp. 582 to 584).*The only thing of importance in this inscription is the date and the fact that it starts with an invocation to 'Shiv'. The second inscription is of the Kalchuri or Chedi year 919. The stone which bears this inscription is built in the temple of Chandrachudeavars which stands in close vicinity to that of Narayana temple. The date of the inscription is not available but the year corresponds to 1167-68 A. D. The inscription belongs to the reign of Jajalladeva II of the Kalchuri

Dynasty of Ratanpur. The immediate object of the inscription is to record the donation of the village Chincheli by Amanadeva, a descendant of a collateral branch of the Kalchuri Dynasty for the purpose of defraying the expenses of worship of God Chandrachude and the erection of a temple of Durga in front of the shrine. The inscription is, however, historically important as it furnishes an account of the collateral Dynasty of Ratanpur. This inscription also begins with an invocation to Shiv: (Inscriptions of the Kalachuri Chedi Era Pt. II, pp. 519 to 527). It is generally believed that the temple of Narayana was constructed during the same period to which the above inscriptions belong. There is some controversy as to whether the idol in this temple is of Vishnu or Shiva. It is stated in the Archaeological Survey of India Report, Vol. VII, p. 196 that the deity in the temple is Shaivic and not Vaishnavic. The same thing is repeated in the Madhya Pradesh District Gazetteer of Bilaspur District at p. 524. The Survey Report which states that the idol is of Shiv was made by J.D. Beglar, who was Assistant to Major-General A. Cunningham, Director General, Archaeological Survey of India. The inference drawn by Beglar on this point does not appear to be correct. The idol is a figure in a sitting posture and not Shivalingum. The very fact that the idol has been worshipped as Narayana or Vishnu for ages proves that it is of Vishnu and not of Shiv. Probably, the Beglar's report was influenced by the fact that the stone inscriptions which we have referred to above begin with an invocation to Shiva and the Kalchuri Rulers in whose reign the Shrine was founded were also of Saivic faith. In our opinion, however, the correct position is stated by Dr. Mirashi in his introduction to Vol. IV of Corpus Inscriptionum Indicarum (Inscriptions of the Kalachuri-Chedi Era Pt. I, pp. xxiii, cxv, cli and clxiii) that though Saivism was the predominant cult in Dakshina Kosala i.e. Chattisgarh, but Vaishnavism also was prevalent and that the old temple at Sheorinarayan is of Vishnu and was erected by a collateral branch of the royal family of Ratanpur. This is also the view of a modern author as Kalchuri Rulers and their descendants: (See Kalchuri Naresh Aur Unke Vanshaj (1982) p. 33 by Dr. Ram Kumar Singh). The parties have also accepted this position before us."

15. In AIR 1996 Himachal Pradesh 102 (*Kashmiru. v. Sh. Doud*) the Hon'ble Himachal Pradesh High Court has quoted and relied on the gazetteer of the Chamba State in respect of customary form of marriage "*Jhanjrara marriage*". Relevant paragraph 11 of the said judgment reads as follows:

"11. It has come in the evidence examined by the parties before the trial Court that plaintiff married Smt. Jugni by way of "*Jhanjrara*" marriage which is customary form of marriage. Otherwise also, this customary type of Jhanjrara marriage has been recognised to be a customary marriage prevalent in Chamba District as is evident from the book titled Gazetteer of the Chamba State, Part A-1904, page 126, wherein form of marriages have been described as under :

"Among all castes three kinds of marriages are in vogue : (i) regular (byah); (ii) jhanjrara and (iii) jhind phuk or man-marzi. Regular marriage involves betrothal (marigni) and the orthodox phera and the chhe-chap

are essential. In a Jhanjrara the bride puts on ornaments, especially the nose-ring (nath), a red string to bind her hair (dori), and a bodice (choli). In both forms of customary marriage the worship of the family god or of a lamp is essential. The Jhanjrara rite is customary in the remarriage of a widow or of a woman divorced by her former husband, it is called choli-dori. especially in the Sadar and Brahmaur Wizarats and sargudhi in Churah. “

16. Section 35 of the Evidence Act, 1872 says, inter alia, that an entry in any public or other official book stating a fact in issue or relevant fact and made by a public servant in discharge of his official duty is itself a relevant fact. As such, the facts that the Hindus were continuously worshipping in the alleged Babri mosque which was erected over the Ramjanamsthan temple is itself a relevant evidence as recorded in the gazetteers relied by this defendant. The said Section 35 of the Evidence Act, 1872 reads as follows.

“35. Relevancy of entry in public record, made in performance of duty.—An entry in any public or other official book, register or record [or an electronic record] 1, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record [or an electronic record] 2 is kept, is itself a relevant fact.”

17. That Section 45 of the Evidence Act, 1872 makes opinions of the experts, inter alia, in assistance or law are in question as of entity of hand writings or finger impression are relevant facts and admissible evidence.

“ 45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting 1[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, 2[or in questions as to identity of handwriting] 3[or finger impressions] are relevant facts.

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.”

18. Section 57 of the Evidence Act, 1872, inter alia, says that the Court shall take judicial notice of all laws, public acts, public festivals, fasts and holidays notified in the official gazette as also on all matters of public history, literature, science or arts, the Court may resort for its aid to appropriate books or documents of reference if the Court is called upon by any person to take judicial notice of any fact. As this defendant has already prayed for taking judicial notices of the books containing present laws of the Hindus and Muslims, others books, historical books, gazetteers etc. and this Hon'ble High Court has allowed the said prayer, the facts stated in those books are admissible as evidence under the relevant provisions of the aforesaid Section. Section 57 of the Evidence Act, 1872 reads as follows:

“ **57. Facts of which Court must take judicial notice.**—The Court shall take judicial notice of the following facts:

1[(1) All laws in force in the territory of India;]

(2) All public Acts passed or hereafter to be passed by Parliament 2[of the United Kingdom], and all local and personal Acts directed by Parliament 3[of the United Kingdom] to be judicially noticed;

(3) Articles of War for 4[the Indian] Army, 5[Navy or Air Force];

6[(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the State;]

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;

(6) All seals of which English Courts take judicial notice: the seals of all the 7[Courts in 8[India]] and of all Courts out of 9[India] established by the authority of 10[the Central Government or the Crown Representative]: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by 11[the Constitution or an Act of Parliament of the United Kingdom or an] Act or Regulation having the force of law in 12[India];

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any 13[State], if the fact of their appointment to such office is notified in 14[any official Gazette];

(8) The existence, title, and national flag of every State or Sovereign recognized by 15[the Government of India];

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette;

- (10) The territories under the dominion of 16[the Government of India];
- (11) The commencement, continuance and termination of hostilities between 17[the Government of India] and any other State or body of persons;
- (12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it;
- (13) The rule of the road 18[on land or at sea].

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference. If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

19. Section 81 of the Evidence Act, 1872, inter alia, says that the Court shall presume the genuineness of any official gazette, or the government gazette and of every document purporting to be a document directed by any law. Said Section 81 of the Evidence Act, 1872 reads as follows:

"81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.—The Court shall presume the genuineness of every document purporting to be the London Gazette or 1[any Official Gazette, or the Government Gazette] of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament 2[of the United Kingdom] printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody."

20. In AIR 1931 PC 212 (*Devasthanam Madura. v. Ali Khan Sahib*) on its page 215, the Privy Council extracted the facts from Madura Gazetteer in respect of Tirupparankundram temple and also held that though there is a general presumption that waste land are the property of the crown, but it is not applicable where alleged waste is, at all found, physically within a temple. Relevant extracts from pages 214 to 216 of the said judgment read as follows:

Their main criticism of the Subordinate Judge is that "he refused to draw the proper presumption from the admitted facts of the case," and that this vitiates his consideration of all the evidence. The presumption which they draw is that the unoccupied portions of the hill belong to Government, and they appear to base this upon historical grounds.

It is necessary therefore to trace shortly the fortunes of the temple in the 17th and 18th centuries, for which the authorities relied on are principally the "Madura Gazetteer," and Nelson's "Manual of the Madura Country," a compilation of great interest which has frequently been cited before this Board.

There appears to be no doubt that under the Nayakkan Kings of Madura the seven temples in and in the immediate neighbourhood of the capital were endowed with large revenues derived from a number of villages. The temples were known as the Hafta Devasthanam, and included the Tirupparankundram Temple. It seems probable that this endowment was due mainly to the generosity of Tirumala, a famous member of that dynasty who reigned from 1623 to 1659. During the century and a half that followed the history of Madura is a confused record of internecine warfare, in which the incursions of Mahomedan, Mysorean and Mahratta invaders played the largest part, and these were succeeded by the gradual, but by no means peaceful, penetration of the East India Company. During those troublous times the Hafta Devasthanam lands seem to have disappeared piecemeal. What remained of them when Chanda Sahib, nominally representing the Nawab of Arcot, established himself in Madura in 1738 were then confiscated. His domination was interrupted by another invasion of the Mahrattas, who probably restored a portion of the old endowments. They again were ousted by the Nizam in 1744, and the temples fared no better than before. Then followed the intervention of the East India Company. Madura was eventually subdued by their troops under Mahomed Yusuf Khan, who in due course established himself as ruler. In 1763 he was besieged in Madura by the Company's army, and after a memorable defence was betrayed and executed.

Thenceforward Madura seems to have come gradually under the Company's control, and after the fall of Seringapatam the civil and military administration of the district was formally made over, as part of the Carnatic, to the British under Lord Clive's treaty with Azim-ul-Dowla of 31st July 1801 (Aitchison's Treaties, Edn. 4, X. 57).

Mahomed Yusuf Khan (above referred to), who was apparently a Hindu by birth, re-established the endowment of the temples by a money grant, possibly derived from the revenues of the confiscated villages but the villages themselves were not restored.

This was the position when Mr. Hurdis, who was already in charge of the adjoining district of Dindigul, became the first British Collector of Madura, and carried out an elaborate survey and settlement of the country. He was in considerable doubt as to the course that should be adopted with regard to the Hafta Devasthanam lands. The Board of Directors ordered their restoration to the temples, but for some unexplained reason this order was never carried out, a *tasdik* or annual allowance in money being paid in lieu thereof to each of the temples. The Tirupparankundram *tasdik*, according to Nelson's account, was a sum of Rs. 2,651-8-3.

Their Lordships will now return to the matter with which the present appeal is immediately concerned. The question is whether any presumption should be drawn from the confiscation of the endowed villages as to the proprietary rights in the waste land situate within the 'ghiri veedhi' and forming part of the 'malaiprakaram.' It is admitted that the village of Tirupparankundram, in which the temple is situated, was part of this endowment.

The Subordinate Judge thought that there was nothing in the long story, which their Lordships have attempted to summarize in the preceding pages, to suggest that the temple had ever been ousted from its possession of the hill. The High Court, on the other hand, took the view that the hill being part of the village, it must be presumed to have been confiscated with the village, and to have become in 1801 Government property.

The conclusion to which their Lordships have come is that the Subordinate Judge was right. There is no trace in the historical works to which they have been referred of any interference by the Mahomedan invaders with the sacred hill or the immediate surroundings of the temple. They and the other predatory forces which established themselves from time to time in Madura, no doubt seized the revenue-producing lands which formed the joint endowment of all the temples, and these must have included the cultivated and assessed lands within the 'ghiri veedhi,' but there seems to be no suggestion that the Tirupparankundram

Temple or any of its adjuncts passed at any time into secular hands. It was probably during some interval of Mahomedan domination that the mosque and some Mahomedan houses were built (though the Mahomedans themselves ascribe the mosque to a much earlier period), but this was an infliction which the Hindu occupants of the hill might well have been forced to put up with ; it is, their Lordships think, no evidence of their expropriation from the remainder.

But the more relevant period to consider is that following the cession of sovereignty in 1801. The only rights which the temple can assert against the respondent are rights which the East India Company granted to them or allowed them to retain : see *Secy. of State v. Bai Rajbai* (1), and their Lordships think the evidence shows that the temple was left after 1801 in undisturbed possession of all that it now claims. Indeed, the policy of the Directors seems to have been rather to restore to the temples what they had been deprived of in the long years of anarchy which had preceded British rule, than to mulct them of any remnant that was left. It is, in their Lordships' view, hardly, conceivable that the East India Company would have wished, for no gain to themselves, to appropriate what was plainly the 'prakaram' of an ancient temple studded with shrines, 'inandapams' and other accessories to the worship of its devotees. Nor is there in the reports of Mr. Hurdis, or of any of his successors, which are summarized in the Nelson Manual, any hint of such a policy or of any claim by Government to rights over the hill.

(1)

AIR 1915 PC 59=30 IC 303=42 IA 229=39 Bom. 625(PC).

Their Lordships do not doubt that there is a general presumption that waste lands are the property of the Crown, but they think that it is not applicable to the facts of the present case where the alleged waste is, at all events physically, within a temple enclosure. They see no reason to disagree with the Subordinate Judge's discussion of the authorities on this question. Nor do they think that any assistance can be derived, under the circumstances of this case, from the provisions of the Madras Land Encroachment Act 3 of 1905, on which the respondent has relied.

PART- XXV

FARMAN OF THE EMPEROR SHAHJAHAN HELD THAT THE BUILDING OVER THE LAND OF A TEMPLE IS NOT A MOSQUE AND OWNER OF THE TEMPLE IS ENTITLED FOR RESTORATION OF POSSESSION WITH LIBERTY TO WORSHIP THEREIN ACCORDING TO HIS OWN RELIGION HAS FORCE OF LAW:

1. In AIR 1963 SC 1638 (*Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan & Ors.*) the Bench comprised of Hon'ble Five-Judge of the Hon'ble Supreme Court has held that the *Farman* issued by an absolute ruler like the *Maharana* of Udaipur in 1934 is a law by which the affairs of the Nathdwara temple and succession to the office of the Tilkayat were governed after its issuance. Relying on said judgment it is submitted that the *Farman* of the Emperor Shahjahan wherein it has been held that a building constructed over the land of the temple of other person can not be a mosque is admissible as ratio of Law of Shar so far it doesn't contradict the law of Shar, and it is further submitted that any addition, alteration or modification made by any Rulers arbitrarily in violation of the law for the time being in force cannot convert Sri Ramajanmasthan Temple into an alleged mosque. Relevant paragraphs 32 and 33 of the aforesaid judgment reads as follows:

"32. In appreciating the effect of this Firman, it is first necessary to decide whether the firman is a law or not. It is matter of common knowledge that at the relevant time the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State. In the case of an absolute Ruler like the Maharana of Udaipur it is difficult to make any distinction between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and did govern the rights of the parties affected thereby. This position is covered by decisions of this court and it has not been disputed before us, vide *Madhaorao Phalke v. State of Madhya Bharat*, 1961-1 SCR 957 : (AIR 1961 SC 298). *Ameer-un-Nissa Begum v. Mahboob Begum*, AIR 1955 SC 352 and *Director of Endowments. Government of Hyderabad v. Alkram Alim* (S) AIR .1956 SC 60.

33. It is true that in dealing with the effect of this Firman, the learned Attorney-General sought to raise before us a novel point that under Hindu law even an absolute monarch was not competent to make a law affecting religious endowments and their administration. He suggested that he was in position to rely upon the opinions of scholars which tended to show that a Hindu monarch was competent only to administer the law as prescribed by Smritis and the oath which he was expected to take at the time of his coronation enjoined him to obey the Smritis and to see that their injunctions were obeyed by his subject. We did not allow the learned Attorney-General to develop this point because we hold that this novel point cannot be accepted in view of the well-recognised principles of jurisprudence. An absolute monarch was the fountain-head of all legislative, executive and judicial powers and it is of the very essence of sovereignty which vested in him that he could supervise and control the administration of public charity. In

our opinion there is no doubt whatever that this universal principle in regard to the scope of the powers inherently vesting in sovereignty applies as much to Hindu monarchs as to any other absolute monarch. Therefore, it must be held that the Firman issued by the Maharana of Udaipur in 1934 is a law by which the affairs of the office Nathdwara Temple and succession to the office of the Tilkayat were governed after its issue."

2. In AIR 1961 SC 298 (*Madha Rao Phalke. v. Land of Madhya Bharat & Anr.*) a Bench comprised of Hon'ble five-Judges the Hon'ble Apex Court has held that the orders issued by absolute Monarch ruler of Guwalior State at force of law and would amount to existing law. Relevant paragraphs 11, 12, 14 and 18 of the said judgment reads as follows:

"11. In dealing with the question as to whether the orders issued by such as absolute monarch amount to a law or regulation having the force of law, or whether they constitute merely administrative orders, it is important to bear in mind that the distinction between executive orders and legislative commands is likely to be merely academic where the Ruler is the source of all power. There was no constitutional limitation upon the authority of the Ruler to act in any capacity he liked; he would be the supreme legislature, the supreme judiciary and the supreme head of the executive, and all his orders, however issued, would have the force of law and would govern and regulate the affairs of the State including the rights of its citizens. In *Ameer-un-Nissa Begum v. Mahboob Begum*, AIR 1955 SC 352, this Court had to deal with the effect of a Firman issued by the Nizam, and it observed that so long as the particular Firman issued by the Nizam, held the field that alone would govern and regulate the rights of the parties concerned though it would be annulled or modified by a later Firman at any time that the Nizam willed. What was held about the Firman about all the Nizam would be equally true about all effective orders issued by the Ruler of Gwalior (Vide also : *Director of Endowments, Government of Hyderabad v. Akram Ali*, (S) AIR 1956 SC 60).

12. It is also clear that an order issued by an absolute monarch in an Indian State which had the force of law would amount to an existing law under Art. 372 of the Constitution. Article 372 provides for the continuance in force of the existing laws which were in force in the territories of India immediately before the commencement of the Constitution, and Art., 366(10) defines an existing law, inter alia, as meaning any law, ordinance, order, rule or regulation passed or made before the commencement of the Constitution by any person having a power to make such law, ordinance order, rule or regulation. In *Edward Mills Co., Ltd., Beawar v. State of Ajmer*, (S) AIR 1955 SC 25, this Court has held that "there is not any material difference between the expressions 'existing law', and the 'law in force'. The definition of an existing law in Art. 366 (10) as well as the definition of an Indian law contained in Sec. 3(29) of the General Clauses Act make this position clear". Therefore, even if it is held that the Kalambandis in question did not amount to a quanun or law technically so called, they would

nevertheless be orders or regulations which had the force of law in the State of Gwalior at the material time, and would be saved under Art. 372. The question which then arises is whether these Kalambandis were regulations having the force of law at the material time.

18. It is not disputed that if the Kalambandis on which the appellant's right is based are rules or regulations having the force of law the impugned executive order issued by respondent 1 would be invalid. The right guaranteed to the appellant by an existing law cannot be extinguished by the issue of an executive order. In fact on this point there has never been a dispute between the parties in the present proceedings. That is why the only point of controversy between the parties was whether the Kalambandis in question amount to an existing law or not. Since we have answered this question in favour of the appellant we must allow the appeal set aside the order passed by the High Court and direct that a proper writ or order should be issued in favour of the appellant as prayed for by him. The appellant would be entitled to his costs throughout."

3. In AIR 1955 SUPREME COURT 352 "Ameer-un-Nissa Begum v. Mahboob Begum" the Hon'ble Supreme Court held that the firmans were expressions of the sovereign will of the Ruler and they were binding in the same way as any other law; nay, they would override all other laws which were in conflict with them. So long as a particular firman held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later Firman at any time. Relevant paragraph 15 of the said judgment reads as follows:

"15. The determination of all these questions depends primarily upon the meaning and effect to be given to the various 'Firmans' of the Nizam which we have set out already. It cannot be disputed that prior to the integration of Hyderabad State with the Indian Union and the coming into force of the Indian Constitution, the Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was the supreme legislature, the supreme judiciary and the supreme head of the executive, and there were no constitutional limitations upon his authority to act in any of these capacities. The 'Firmans' were expressions of the sovereign will of the Nizam and they were binding in the same way as any other law; - nay, they would override all other laws which were in conflict with them. So long as a particular 'Firman' held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later 'Firman' at any time that the Nizam willed."

PART-XXVI

INSTANT SUIT IS BARRED BY SECTION 87(1) OF THE WAQFS ACT, 1995:

1. In view of the findings recorded by the Learned Civil Judge on 21-04-1966 in deciding the issue No.17 to the effect that. "No valid notification under Section 5(1) of the Muslim Act (No.XIII of 1936) was ever made in respect of the property in dispute" ; the plaintiff Sunni Central Board of Waqf has no right to maintain the present suit and the present suit is liable to be dismissed under Section 87 of The Waqf Act, 1995 (Act No.43 of 1995) which reads as follows:

"87. Bar to the enforcement of right on behalf unregistered wakfs.—

(1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any *wakf* which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any Court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any court after such commencement unless such *wakf* has been registered, in accordance with the provisions of this Act.

(2) The provisions of sub-Section (1) shall apply as far as may be, to the claim for set-off or any other claim made on behalf of any *wakf* which has not been registered in accordance with the provisions of this Act."

2. As the said Section 87(1) of the Wakf Act, 1995 contains a non-obstante clause which shall not only prevail over the contract but also other laws in view of the judicial pronouncement made in Union of India & ors. vs. SICOM Ltd. & Anr. reported in 2009 AIR SCW 635 as also in 2009 CLC 91 (Supreme Court) relevant portion of paragraph 3 whereof (at page SCW 638) reads as follows:

"3. Mr. Shekhar Naphade, Learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that principle that a crown debt prevails over other debts is confined only to the unsecured ones as secured debts will always prevail over a crown debt. Our attention in this behalf has been drawn to the non obstante clause contained in Section 56 of the 1951 Act. It was furthermore contended that for the self-same reason Section 529A in the Companies Act was inserted in terms by way of special provisions creating charge over the property and some of the State Governments also amended their Sales Tax Laws incorporating such a provision. The Central Government also with that view, amended the Employees' Provident Funds and (Miscellaneous) Provisions Act, 1952 and Employees' State Insurance Act, 1948.

The learned counsel appears to be right."

3. In State Bank of India vs. Official Liquidator of Commercial Ahmedabad Mills Co. & Ors. reported in 2009 CLC 73 (Gujrat High Court) it has also been held

that a non-obstante clause would override all other provisions of the Act as well as any other law in force in the said date. Paragraphs 13, 14 and 17 of the said judgment read as follows:

“13. Section 529-A of the Act opens with a non obstante clause and stipulates that notwithstanding anything contained in any other provisions of the Act or any other law for the time being in force in the winding up of a Company, workers’ dues and debts due to secured creditors, shall rank *pari passu* and shall be paid in priority to all other debts. Therefore, the said provision has an overriding effect not only qua the provisions of the Act but also any other law for the time being in force. Section 529-A of the Act was inserted on the statute book vide Act No. 35 of 1985 with effect from 24-5-1985 and, therefore, would override all other provisions of the Act as well as any other law in force on the said date.

14. Therefore, *prima facie*, provisions of Section 42 of ULC Act cannot claim primacy over provisions of Section 529-A of the Act considering the fact that ULC Act was brought on statute in 1976 while Section 529-A of the Act is a subsequent legislation brought on statute book in 1985. Possibly this aspect of the matter, may not have been brought to the notice of the Company Court. However, the jurisdiction vested in a Company Court is a special jurisdiction and considering the true scope and object of the provisions of Section 529-A of the Act, Official Liquidator functions under the directions of the Company Court and acts for and on behalf of the Company Court, primarily to ensure that the interest of workmen of a Company (in liquidation) do not go unrepresented and are taken care of. This salutary feature of functioning of Company Court could not have been overlooked by the Company Court while determining the issue in question.

17. Thus what is the effect of provisions of Section 529-A of the Act have to be necessarily considered by the Company Court in every matter where the properties/assets of the Company (in liquidation) are claimed by a person other than secured creditors and workmen. The Company Court could not have decided the matter as if the issue was only a dispute between the land owner and the competent authority under the ULC Act. It is equally well settled in law that though procedural compliance is required to be established in justification of an action, yet at the same time, mere form over substance cannot be preferred.”

4. The bar to the enforcement of right on behalf of the unregistered wakfs imposed under Section 87(1) of the Wakf Act, 1995 is clearly reasonable and in the interest of the general public in view of the judicial pronouncement of the Hon’ble Supreme Court of India in *Bhandara District Central Cooperative Bank Ltd. & Ors. vs. State of Maharashtra & Anr.* reported in 1993 Supp (3) SCC 259 wherein the provisions of Section 145 of Maharashtra Cooperative Societies Act, 1996 which barred an unregistered society from using the word ‘co-operative’ in its name or title, was held reasonable and in the interest of the general public as the purpose of said Section 145 was to ensure that the

general public had adequate notice that a society they might have to deal with, was unregistered. Paragraph 3 of the said judgment reads as follows:

“3. According to the case of the petitioners, the designated officers are entitled to manage the affairs of the cooperative societies as entrusted to them by the members, without any interference by the legislature, and the restrictions imposed by the impugned provisions are violative of their fundamental rights as protected by Article 19(1)(c) and (g) of the Constitution. The members of a cooperative society, according to the argument, are entitled to conduct the affairs of the society in accordance with their choice and any interference in this is uncalled for. We were not able to fully appreciate this argument, and so we pointed out to Mr Anil B. Divan, the learned counsel for the petitioners (that is, the appellants in Civil Appeal No. 2706 of 1988), that there was no impediment in the running of the societies, and the impugned provisions are attracted only in such cases where the societies are desirous of being registered under the Act with a view to take advantage of the provisions thereunder. The Act does not place any restriction on the formation of any association or union for carrying on any trade or business, nor does it require such unions or societies to be registered under the Act. The petitioner-societies were free to proceed as they wished (of course, they could not be allowed to contravene any law) without being subjected to any condition placed by the Act, but in that case they would not be entitled to the benefits of the Act. Mr Divan appreciating the situation, explained his point by saying that as a consequence of Section 145 of the Act an unregistered society is not entitled to use the word “cooperative” in its name or title (without the sanction of the State Government) and this by itself puts the society under a disadvantage, affecting its trade and business. The learned counsel fairly conceded that he is not in a position to rely on any other circumstance in support of his argument based on Article 19(1)(c) and (g). We do not find any merit in this point which is solely based on the ban of the use of the word “cooperative”, by Section 145. The restriction is clearly reasonable and in the interest of the general public and is, therefore, saved by clause (6) of Article 19. The purpose of Section 145 is to ensure that the general public has adequate notice that a society they may have to deal with, is unregistered and, therefore, not amenable to the provisions of the Act, before taking a decision about their relationship with the same. The 265 persons desirous of running a society have been placed under an obligation to publicly declare that their society is not registered under the Act, and we do not see any valid objection to this course. The main argument of Mr Divan is, therefore, overruled.”

5. In AIR 1958 A.P. 773 (*Pamulapati Buchi Naidu College Committee Nidubrolu & Ors. v. Government of Andhra Pradesh & Ors.*) the Hon'ble Andhra Pradesh High Court held that if a society is not registered under the Act, it would have the character of an association which cannot sue or be sued except in the name of all the members of the association. The registration of the society confers on it certain advantages. Once the society is registered it enjoys the status of a legal entity apart from the members constituting the same and is

capable of suing or being sued. Relying on said judgment, it is humbly submitted that similar fate is of unregistered waqf. Registration of waqf confers right upon the Central Board of Waqfs to sue or be sued in respect of the affairs and properties of the registered waqf while in case of unregistered waqf of alleged Babri Masjid the Sunni Central Board of Waqfs has no right to maintain instant suit as such the instant suit is liable to be dismissed. Relevant extracts from paragraph 19 of the said judgment reads as follows:

“(19) The basic assumption made by the learned counsel for the petitioner that the registration of society can be equated to the granting of a Royal Charter, does not rest on a solid foundation. A society registered under the Societies Registration Act is an association of individuals which comes into existence with certain aims and objects. If it is not registered as a society under the Act, it would have the charter of a association which cannot sue or be sued except in a name of all the members of the association. The registration of the Society confers on it certain advantages. The members as well as the Governing Body of the Society are not always the same. Even though the members of the Society or the Governing Body fluctuate from time to time, the identity of the society is sought to be made continuous by reason of the provisions of the Societies Registration Act.

The Society continues to exist and to function as such until its dissolution under the provisions of the Act. The properties of the society continue to be vested in the trustees or in the governing Body irrespective of the fact that the members of the society for the time being are not the same as they were before; nor will be the same thereafter.

By reason of the provisions of the Societies Registration Act, once the society is registered with the Registrar, by the filing of the memorandum and certified copy of the rules and regulations and the Registrar has certified that the society is registered under the Act, it enjoys the status of a legal entity apart from the members constituting the same and is capable of suing or being sued.

But the fact to be noted is that what differentiates a society registered under the Act of 1860 from a company incorporated under the Companies Act is that the latter case the share-holders of the company hold the properties of the company as their own whereas in the case of a society registered under the Act of 1860, the members of the society or the members of the governing body do not have any proprietary or beneficial interest, in the property the society holds.

Having regard to the fact that the members of the general body or the members of the governing body of the society do not have any proprietary or beneficial interest in the property of the society, it follows that upon its dissolution, they cannot claim any interest in the property of the dissolved society. The Societies Registration Act, therefore, does not create in the members of the registered society any interest other than that of bare trustees. What all the members are entitled to is the right of management of the properties of the society subject to certain conditions.

6. In AIR 1959 MP 172 (*Radhasoami Satsang Sabha Dayalbag v. Hanskumar Kishanchand*) the Hon'ble Madhya Pradesh High Court held that the registration under the Societies Registration Act, confers on a society a legal personality and make it corporation or quasi-corporation capable of entering into contracts. Relying on said judgment it is submitted that unregistered alleged Babri Mosque waqf cannot confer any right upon the Sunni Central Board of Waqfs to make them competent to maintain the instant suit for and on behalf of such unregistered waqf. Relevant paragraph 13 of the said judgment reads as follows:

“(13) It is not disputed that the plaintiff society being a registered society under the Societies Registration Act, is a corporation or a quasi-corporation capable of entering into a contract. The registration confers on the plaintiff Sabha a legal personality and consequently any contract entered into by it would be legally enforceable, unless it was vitiated by any illegality or was shown to be void for any reason.”

7. The United Provinces Muslim Waqfs Act, 1936 provides that under its Section 4(1) within three months of the commencement of the said Act, the local Government shall by notification in the gazette appoint for each District Commissioner of Waqfs for the purpose of making a survey of all waqfs in such district and to submit his enquiry report to the local Government under Section 4(5) of the said Act. Section 5(1) of the said Act provides that the local Government shall forward a copy of the Commissioner's report to each of the Central Boards and each Central Board shall, as soon as possible, notify in the gazette the waqfs relating to the particular sect to which, according to such report, the provisions of that Act apply. Only after such notification a waqf can be registered under Chapter III. As such, after declaration of the notification under Section 5(1) of the said Act invalid by the learned trial Judge in disposing of the issue No.17 in the instant suit vide His order dated 21.04.1966, the registration of the waqf based on said notification became ab initio null and void.
8. The relevant provisions of the United Provinces Muslim Waqfs Act, 1936 read as follows:

“4. (1) Within three months of the commencement of this Act the Local Government shall by notification in the Gazette appoint for each district a gazette officer, either by name or by official designation, for the purpose of making a survey of all waqfs in such district, whether subject to this Act or not. Such officer shall be called the “Commissioner of Waqfs.

a. ...

(5) The Commissioner of Waqfs shall submit his report of inquiry to the Local Government.

5. (1) The Local Government shall forward a copy of the Commissioner's report to each of the Central Boards constituted under this Act. Each Central Board shall as soon as possible notify in the Gazette the waqfs relating to the particular sect to which, according to such report, the provisions of this Act apply.

38. (1) Every waqf whether subject to this Act or not and whether created before or after the commencement of this Act shall be registered at the office of the Central Board of the sect to which the waqf belongs.

(2) The mutwalli of every such waqf shall make an application for registration within three months of his entering into possession of the waqf property, or in the case of waqf existing at the time of formation of the first Central Board, within three months of the formation of such Central Board.

(3) Application for registration may also be made by a waqif or his descendants or a beneficiary of the waqf, or any Muslim belonging to the sect to which the waqf belongs.

...

(6) On receipt of an application for registration the Central Board may before registering the waqf make such inquiries as it thinks fit in respect of its genuineness and validity and the correctness of any particulars in the statement filed with the application and when the application is made by any person other than the person holding possession of any property or properties belonging to the waqf, the Central Board shall give notice of the application to the person in possession and hear him, if he desired to be heard, before passing final orders.

40. The Central Board may direct a mutawalli to apply for the registration of a waqf, or to supply any information regarding a waqf or may itself collect such information and may cause the waqf to be registered or may at any time amend the register of waqfs."

9. Sections 18(1) and 18(2)(e) & (g) of the United Provinces Muslim Waqfs Act, 1936 provide that the Central Board can maintain suit in respect of administration and recovery of lost properties only of those waqfs to which the provisions of the said Act applies. As the provisions of the said Act does not apply to the waqf in respect whereof notification under Section 5(1) has not been made and in furtherance whereof has not been registered under Section 38 or Section 40, as the case may be. Be it mentioned herein that Section 38(1) which is a mandatory provision provides that the mutawalli of every waqf whether created before or after the commencement of that Act shall make an application for registration within three months of its entering into possession of the waqf property or in the case of waqf existing at the time of formation of the first Central Board within three months of the formation of such Central Board. Sections 18(1), 18(2)(e), (f) & (g) of the said Act read as follows:

"18. (1) The general superintendence of all waqfs to which this Act applies shall vest in the Central Board. The Central Board shall do all things reasonable and necessary to ensure that waqf or endowments under its superintendence are properly maintained, controlled and administered and duly appropriated to the purposes for which they were founded or for which they exist.

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers and duties of the Central Board shall be—

...

- (e) to institute and defend suits and proceedings in a Court of Law relating to administration of waqfs, taking of accounts, appointment and removal of mutawallis in accordance with the deed of waqf if it is traceable, putting the mutawallis in possession or removing them from possession, settlement or modification of any scheme of management,
- (f) to sanction the institution of suits under Section 92 of the Code of Civil Procedure, 1908, relating to waqfs to which this Act applies;
- (g) to take measures for the recovery of lost properties;

..."

Prior to 21.4.1966 that is the date of invalidating the notification under Section 5(1) of the United Provinces Muslim Waqfs Act, 1936 by the learned trial Judge in the instant suit, the Uttar Pradesh Muslim Wakfs Act, 1960 (Act No.XVI of 1960) had already come into force wherein under Section 6(2) the Commissioner of Wakfs was empowered to make inquiries in respect of wakfs and to send his inquiry report to each of the Boards and State Government under Section 6(4) of the said Act for its notifying the same in official gazette. Thereafter the notified wakfs were to be registered under Section 29 or 31 as the case may be. The aforesaid provisions of the said Act read as follows:

6. Survey of wakfs.—(1) ...

(2) The Commissioner of wakfs shall after making such inquiries as he may consider necessary, ascertain and determine—

- (a) the number of all wakfs in the area showing te Shia wakfs and Sunni wakfs separately,
- (b) the nature and objects of each wakf,
- (c) the gross income of the property comprised in each wakf,
- (d) the amount of revenue, cesses, rates taxes and surcharge payable to the Government or the local authority in respect of each wakf property,
- (e) expenses incurred in the realization of the income and the pay or other remuneration of the mutawalli of each wakf,
- (f) [omitted by U.P.Act 28 of 1971]
- (g) such other particulars relating to each wakf as may be prescribed,

Provided that where there is a dispute as to whether a particular wakf is a Shia wakf or Sunni wakf and there are clear indications in the recitals of the deed of wakf as to the sect to which it pertains, such dispute shall be decided on the basis of such recitals.

...

(4) The Commissioner, the Additional Commissioner of wakfs or Assistant Commissioner of Wakfs shall submit his report of enquiry containing the particulatrs mentioned in sub-section (2) above to each of the Boards and the State Government and the State Government shall, as soon as possible, notify in the Official Gazette the wakfs relating to

particular sect, to which, according to such report, the provisions of this Act apply.

29. Registration.—(1) Every other wakf, whether subject to this Act or not and whether created before or after the commencement of this Act shall be registered at the office of the Board of sect to which the wakf belongs.

(2) Application for registration shall be made by the mutawalli within three months of his entering into possession of the wakf property.

Provided that such application may be made by the wakif or his descendants or a beneficiary of the wakf or any Muslim belonging to the sect to which the wakf belongs.

...

(7) On receipt of an application for registration, the Board may before the registration of the wakf, make such inquiries as it thinks fit in respect of its genuineness and validity and the correctness of any particular therein, and, when, the application is made by any person other than the person registering the wakf, give notice of the application to the person administering the wakf property and shall, after affording him a reasonable opportunity of hearing pass such orders as it may deem fit.

(8) Any person aggrieved by an order of the Board under sub-section (7) may, by application within 90 days from the date of that order refer the dispute to the Tribunal which shall give its decision thereon."

31. Power to cause registration of wakf and to amend register.—The Board may direct a mutawalli to apply for the registration of a wakf, or to supply any information regarding a wakf or may itself collect information and cause the wakf to be registered or may at any time amend the register of wakf."

11. As after invalidation of notification under Section 5(1) of the United Provinces Act, 1936 neither fresh survey of the waqf in question was caused under Section 6 of the Uttar Pradesh Muslim Wakfs Act, 1960 nor application for registration was made under Section 29(2) of the said Act of 1960 within a period of three months nor the Board did take any steps for registration of the said wakf under Section 31 of the said Act of 1960. The alleged wakf remained unregistered wakf to which neither 1936 Act nor 1960 Act or 1995 Act are applicable as such the Plaintiff Wakf Board has no locus standi and instant Suit is hit by the provision of Section 87(1) of the Wakf Act, 1995. As such, the instant suit is not fit for being continued, heard, tried or decided and is liable to be dismissed on this score alone.
12. Be it mentioned herein that in the Wakf Act, 1954 since repealed Section 66.E had also provision similar to Section 87(1) of the Wakf Act, 1995. Section 66.E of the Wakf Act, 1954 reads 'as follows:

66.E. Institution of suit or legal proceedings in certain cases.—Notwithstanding anything contained in any other law for the time being in force, no suit or legal proceeding in respect of the administration

or management of wakf, or any other matter or dispute for the determination or decision of which provisions have been made in this Act, shall be instituted in any court or Tribunal except under, and in accordance with, the provisions of this Act.”

13. It is also note worthy that section 6 of the Societies Registration Act, 1860 and section 69(2) of the Partnership Act, 1932 allow of suits by or against the registered Societies or Registered Firms respectively and thereby debar office bearer or partner of un-registered Society or Firm for or on behalf of such Societies or Firms . For the purpose of interpretation intention of the legislatures may be inferred by importing from those provisions.

Section 6 of the Societies Registration Act, 1860 reads as follows:

Suits by and against societies.—Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion:

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

Section 69 (1) & (2) of the Partnership Act, 1932 reads as follows:

“69. Effect of non-registration.—(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.”

14. In AIR 1961 SC 808 (*C. Mohammad Yunus. v. Syed Unnissa & Ors.*) the Hon’ble Supreme Court has held that under Section 2 of the Shariat Act, 1937 in questions relating to charities and charitable institutions and charitable and religious endowments, a custom or usage would prevail. But Section 2 of the said Act as amended by Madras Act, XVIII of 1949 the rule of decision even in matters regarding wakf relating to above subject is the Muslim personal law notwithstanding a custom or usage to the contrary. Though the provision affect vested rights of the parties, the intention of the legislature was clear and the act applied to all cities and provinces pending even in appeal on the date when the Act was brought into operation. Relevant paragraph Nos.9 and 10 of the said judgment read as follows:

“9. Under the Shariat Act, 1937, as framed, in questions relating to charities and charitable institutions and charitable and religious

endowments, the custom or usage would prevail. But the Act enacted by the Central Legislature was amended by Madras Act 18 of 1949 and s. 2 as amended provides:

“Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract, or gift or any other provision of Personal law, marriage, dissolution of marriage, including Tallaq, ila, zihar, lian, Khula and Mubarrat, Maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)”.

10. Manifestly by this “Act, the rule of decision” in all questions relating to intestate succession and other specified matters including wakfs where the parties to the dispute are Muslims is the Muslim Personal Law,. The terms of the Act as amended are explicit. Normally a statute which takes away or impairs vested rights under existing laws is presumed not to have retrospective operation. Where vested rights are affected and the question is not one of procedure, there is a presumption that it was not the intention of the legislature to alter vested rights. But the question is always one of intention of the legislature to be gathered from the language used in the statute. In construing an enactment, the court starts with a presumption against retrospectivity if the if enactment seeks to affect vested rights: but such a presumption may be deemed rebutted by the amplitude of the language used by the Legislature. It is expressly enacted in the Shariat Act as amended that in all questions relating to the matters specified, “the rule of decision” in cases where the parties are Muslims shall be the Muslim Personal Law. The injunction is one directed against the court: it is enjoined to apply the Muslim Personal Law in all cases relating to the matters specified notwithstanding any custom or usage to the contrary. The intention of the legislature appears to be clear; the Act applies to all suits and proceedings which were pending on the date when the Act came into operation as well as to suits and proceedings filed after that date. It is true that suits and proceedings which have been finally decided would not be affected by the enactment of the Shariat Act, but if a suit or proceeding be pending even in appeal on the date when the Act was brought into operation, the law applicable for decision would be the Muslim Personal Law if the other conditions prescribed by the Act are fulfilled. In our view, the High Court was right in holding that it was bound to apply the provisions of the Shariat Act as amended by Madras Act 18 of 1949 to the suit filed by the plaintiffs.”

15. In the application for registration of waqf made under section 38 of the United Provinces Muslim Waqfs Act, XIII of 1936 being exhibit 38 on pages 199 to 205 of the Volume No. 11 of the documents filed in the instant suit by the Plaintiffs in its column no.3 it has been stated that there is no waqf but the waqifs are Emperor Babar and Nawab Sa'-a-Dat Ali Khan. Below column no.16 there is a note which says that the claim of the alleged Mutwalli's family is that the within mentioned property said to be granted for maintenance of the

alleged Babari Mosque at somewhere else is not a waqf but a Service Grant in their favour. The aforesaid application tells the Emperor Babar and Nawab Sa'-a-Dat Ali Khan as joint waqifs which is quite impossible because the Emperor Babar died in 1530 AD while Nawab Sa'-a-Dat Ali Khan ascended on throne in 1732 AD as such the persons who were not contemporary and there was a gap of 202 years between the former and latter they cannot be joint waqifs of same and one waqf alleged to be Babri Masjid Waqf. This fact alone totally falsify the claim of the plaintiffs that the alleged waqf was created by the Emperor Babar. The grant in question was also a service grant not a waqf. The person who made application namely, Syed Kalbe Hussain had also his vested interest as it appears from the note of the application that his intention was to file a case against the persons who were enjoying their property claiming the same to be a service grant; from being motivated with such spirit he made the aforesaid application for registration making fraudulent dishonest false and frivolous statements.

16. Be it mentioned herein that the plaintiffs have used fraud upon this Hon'ble Court by producing wrong transliteration of the note contained in said application for registration. Though in its original Urdu text it has been recorded that the persons recorded in revenue records do not consider it waqf but in Hindi transliteration thereof the plaintiffs by deleting the word 'nahi' of vital importance which finds place in between the words 'waqf' and 'tasleem' have made it meant that those persons says that it is waqf and *nankar mafi*. This fact came into light when the original text was read over in open Court by the Hon'ble Justice S.U. Khan, J. during my argument.
17. In the list of Sunni Waqfs published in supplement to the Government Gazette of United Provinces dated 26th February, 1944 under Section 5 of U.P. Muslim Waqfs Act, XIII of 1936 to which, according to the report of the Commissioner of waqfs, the provisions of the said Act apply; on page 11 at serial no.26 (being the volume No.12 of the documents filed in the instant suit) it has been notified that Babri Mosque is located at Qasba shahnawa not at Ramkot in Ayodhya. Hindi transliteration of relevant page of the said gazette notification containing the name of Badshah Babar on serial No.26 is on page no.341 to 345 of volume 12 of the documents filed in the instant suit. Hindi Transliteration of the proforma of the list as well as the entries against item no.26 of the said list reads as follows:

	नामे वाकिफ या वक्फ	नाम-ए-मतवली मौजूदा	नौ इयते जायदाद मकूफा
26.	बादशाह बाबर	सैयद मोहम्मद जकी मतबली मस्जिद बाबरी कस्बा शाहनवा डाकखाना दर्शनगर	

From the above Gazette notification dated 26th February, 1944 it appears that Badshah Babar had erected a Mosque in Shahnawa town within the postal jurisdiction of Darshan Nagar of which Syed Mohammed Zaki was Mutawalli. The said gazette notification did not say that there was a mosque in Ramkot Pargana Havelli, Ayodhya in the district of Faizabad. As such said Babri

Mosque Waqf cannot be construed to be waqf of any other Babri Mosque located anywhere else.

18. In the said gazette notification dated 26th February, 1944 (on page 479 of the volume 12 of the documents filed in the instant suit) another Babri Mosque along with the Mausoleum of the Emperor Babur has been mentioned in some other district perhaps in the district of Kanpur. It is well known recognized and admitted fact that the Mausoleum of the Emperor Babur is in Kabul, Afghanistan not in India. This is glaring example of the facts of fraud, forgery and fabrication.
19. From the above mentioned relevant entries of the list of the gazette notification dated 26th February, 1944 it becomes clear that the waqf commissioners had not discharged their duties as it was cost upon them under the provisions of the United Provinces Muslim Waqfs Act, 1936 and in very casual manner either on hearsay they have listed several properties as of waqfs or the concern Waqf commissioner were active participant in the fraud, forgery and fabrication.
20. The Waqf Commissioner Faizabad's report dated 8th February, 1941 says that it appears that in 935 A.H. Emperor Babar built Babari or Janam Asthan Mosque at Ajudhya and appointed one Syed Abdul Baqi as the Mutwalli and khatib of the Mosque and for its maintenance an annual grant of Rs.60 was allowed by the said Emperor which continued till the fall of the Mughal kingdom. Later on said grant was increased by Nawab Sa-a-Dat Ali Khan to Rs.302/3/6 but no original papers about this grant by the king of Oudh are available. Relevant extract of said report reads as follows:

"It appears that in 935 A.H. Emperor Babar built this mosque and appointed Syed Abdul Baqi as the mutwalli and khatib of the Mosque (vide clause 2 statement filed by Syed Mohammad Zaqi to whom a notice was issued under the the wakf Act.) An annual grant of Rs. 60/- was allowed by the Emperor for maintenance of the mosque and the family of the first mutwalli Abdul Baqi. This grant was continued till of the fall of the Moghal Kingdom at Delhi and the ascendancy of the Nawabs of Oudh.

According to CI. 3 of the written statement of Mohammad Zaki Nawab Sa'adat Ali Khan, King of Oudh increased the annual grant to Rs. 302/3/6. No original papers about this grant by the king of Oudh are available."

From the aforesaid extract it is crystal clear that the Commissioner on the basis of mere statement of Syed Mohammed Zaki found that the Disputed Janam Asthan Structure was a mosque built by Emperor Babar which is in total discard to his duty cast upon him under said Act XIII of 1936.

21. Commissioner's said report dated 8th Feb. 1941 says that after the mutiny the British Govt. continued the above grant in cash upto 1864 and in the later year in lieu of cash some revenue free land in village Bhuraipur and Sholeypur was granted. The said report further records that Syed Mohammed Zaki produced a copy of the grant order of the British Govt. which was made on condition that Rajab Ali and Mohammad Asghar would render Police, Military

or Political service etc. Thereafter the commissioner records that the above-mentioned object is elucidated in Urdu translation as follows:

“ After the Mutiny, the British Government, also continued the above grant in cash upto 1864, and in the latter year in lieu of the cash grant, the British Government ordered the grant of some revenue free land in villages Bhuraipur and Sholeypur. A copy of this order of the British Government has been filed by the objector Syed Mohammad Zaki (vide Flag A). This order says that ‘the Chief Commissioner under the authority of the Governor General in Council is pleased to maintain the Grant for so long as the object for which the grant has been made is kept up on the following conditions’. These conditions require Rajab Ali and Mohammad Asghar to whom the sunned was given, to perform duties of land holder in the matter of Police Military or political service etc.

The object mentioned above is elucidated in the Urdu translation as follows:-

.....(Urdu Text)

Thus the original object of the state grant of Emperor Babar and nawab Sa'adat Ali Khan is continued in this Sunnad by the British Government also i.e. maintenance of the mosque. The Nankar is to be enjoyed by the grantees for so long as the object of the grant i.e. the mosque is in existence.”

22. In fact, this Urdu elucidation is creation of the said Waqf Commissioner as it is not in the alleged Sunned being page 33 of the volume 6 of the documents filed in the instant suit. Hindi transliteration and meaning of the said elucidative Urdu text as incorporated in the Waqf Commissioner's said report reads as follows:

उस नानकार को जबतक कि मस्जिद जिसके वास्ते ये नानकार दी गयी थी बरकरार है।
हसबे शरायत, दर्ज जैल कायम फरमाते हैं (जो शर्तें लिखी गयी हैं उसे कहते हैं)

A handwritten copy of the said Sunnad with some error has been reproduced at page 27 of volume 10 of the documents filed in the instant suit. In the said alleged original version of the grant Urdu elucidation did not find place. From the said alleged original version of the alleged grant, it becomes crystal clear that the grant, if any, it was a service grant for rendering police, military and political services to the British Govt. against the enemies of the British Govt. Be it mentioned herein that in those days in the eyes of the Britishers the persons who were fighting against them for liberation of their motherland i.e. India they were considered to be mutineers and enemies of the Britishers. As such it can be inferred that the said service grant was given for helping the Britishers to defeat and rout the freedom fighters, not for a good cause of maintaining any Mosque. Full text of the alleged SUNNAD from page 33 of Vol. 6 (hand written copy on page 27 of Vol. 10 that is not accurate) is reproduced as follows:

“ Chief commissioner

It having been established after due enquiry, that Rajub ally and Mohamad Uskar received a Cash Nankar of (Rs.302.3.6) Rupees three

hundred two and three annas and six pie from Mouzah Shanwah Zila Faizabad from former Government. The Chief Commissioner, under the authority of the Governor General in Council is pleased to maintain the grant for long as the object for which the grant has been made is kept the following conditions. That they shall have surrendered all sunnads, title deeds, and other documents relative to the grant. That they and their successor shall strictly (illegible) all the duties of land-holder in matter of police, and an(torn) or political service that they may be required of them by the Authorities and that they shall never fall under the just suspicion of favouring in any way designs of enemies of the British Government. If any one of these conditions is broken by Rajub ally and Mohamad Usgar or their successor the grant will be immediately resumed."

23. From the aforesaid alleged to be original text of the grant as produced by the plaintiffs it becomes crystal clear that Urdu interpolation has been done by the said Commissioner with sole motive to deprive the Hindus from their sacred shrine of Sri Ramjanamsthan which has been described as Babri Mosque in the plaint as well as Janam Asthan Mosque in the said commissioner's report. From the words 'Janam Asthan Mosque' itself it becomes clear that the alleged Mosque was erected over the birth place of someone, and since time immemorial said place is being worshipped by the Hindus asserting that it is the birth place of the Lord of Universe Sri Ram it is needless to say that according to the said Commissioner, the alleged Mosque was erected over the janamasthan of Sri Ramlala.
24. The said Waqf Commissioner after recording the facts that Syed Mohammed Zaki had submitted before him that the said British grant was a service grant in favour of his predecessors for rendering police, military and political services to the Britishers subject to resumption on non-fulfilment of the aforesaid conditions thus it was not a waqf property granted for maintenance of the alleged mosque; the commissioner without any cogent evidence rejected his said contention simply stating that he did not agree to that view because the grant was not originally granted by the Britishers but it was continuation of original grant granted by the Muslim rulers as also for the reasons that after the Ajodhya riot of 1934 Syed Mohammad Zaki had presented an application to Deputy Commissioner in which he had described himself as Mutawalli or trustee of the mosque and of the trust attached thereto. In fact, prior to coming on this reference, in the preceding paragraphs of his said report the said commissioner himself has recorded that no paper of old grant even of the Nawabs of Oudh was available and placed before him. It is contrary to the law of evidence to draw inference on the basis of the statement of a person whose credibility was found suspicious, doubtful and non-reliable. As in his report the commissioner records that said Syed Mohammed Zaki was an opium addict and most unsuited for the proper performance of the duties expected of a Mutwalli of an ancient and historical mosque, which was not kept even in proper repairs for which reason he recommended to discharge the said Mutwalli. Relevant extract from said report is reproduced as follows:

" Syed Mohammad Zaki, the objector, who is known as the Mutwalli of the Babari mosque, and also calls himself as such raises an objection

to the land in Sholeypur and Bhuranpur being regarded as a waqf, because he says the grant has been made for his sustenance only (in Urdu). I do not agree with this view of his. The written statement filled by Mohammad Zaki himself is sufficient to show that the grant has been continued ever since 935 A.H. only because he and his ancestors were required to look after the mosque and keep it in proper condition out of the income allowed to them and also to provide for the maintenance of himself and his ancestors out of a part of the same grant.

Clearly then the grant of land to Mohammad Zaki must be regarded as a Waqf, the purpose of which is the maintenance of the religious building known as the Babari Mosque.

The learned counsel for Mohammad Zaki has also argued.

1) That the particular grant of land in Sholeypur and Bhureypur has been made by the British Government. A Non-Muslim body and hence the grant cannot be regarded as Muslim Waqf.

2) That the grant is a conditional one, being subject to resumption on non fulfillment by the grantee of any of the police Military or duties enjoined in the Sunnad, and that on account of these conditions the grant cannot be classed as a Muslim Waqf.

I do not agree with either view. Firstly the British Government only continued a grant which had been made by the Muslim Government originally and in these circumstances, I cannot but regard the grant as a waqf.

3) As for the second point the conditions have been imposed upon the grantee, and not upon the way in which the grant to be utilized, which latter purpose is recognised as maintenance of the mosque. It is clear that if the conditions are broken the enjoyment of the grant by the Mutwalli himself for his sustenance is to be withdrawn apparently implying that any other mutwalli will then be appointed to administer the grant for the original purpose of maintaining the mosque. I am strengthened in this view because I find the mention of the object of the grant i.e. maintenance of the mosque at the very outset of the Sunnad and the desirability thereof seems to be clear from the whole Sunnad.

I also find that after the Ajodhya riot of 1934, Syed Mohammad Zaki presented an application (Flag Ex. A) to Deputy Commissioner, in which he clearly described himself as Mutwalli or trustee of the mosque and of the trust attached thereto.

I also find that this same Mohammad Zaki submitted accounts in 1925 in Tahsildar's court in which he stated that the income from the grant managed by him was utilized for maintenance of the mosque, pay of Imam Muezzin and the provisions of Iftari etc., during Ramzan after deduction of Rs. 20/- per month for sustenance of the Mutwalli himself. The pay of the Mutwalli spends a much greater portions of the income on his own personal needs. "

25. The Waqf Commissioner Faizabad in his said report dated 8th Feb. 1941 says that he examined Abdul Ghaffar, the then *pes Niwaz* who deposed that the

imam was not being paid for last 11 years and thereafter the said commissioner says that the then Mutawalli Syed Mohammad Zaki was an opium addict and most unsuited to the proper performance of the duties expected from an Mutwalli of an ancient and historical mosque, thus he was liable to be discharged from his duties. Relevant extract from the said report which is on page nos.45 to 48 of the volume No.6 of the documents filed in the instant suit read as follows:

“ The present Mutwalli is of course a Shia. There is no information as to the sect to which Abdul Baqi himself belonged, but the founder Emperor Babar- was admittedly a Sunni, the Imam and Muezzin at the mosque are Sunni and only Sunnis say their preyar in it. Abdul Ghaffar the present Pesh niwaz was examined by me. He swear that the ancestors of Mohammad Zaki were Sunnis who latter on was converted to Shia. He further said that he did not receive his pay during the last 11 years. In 1936 the Mutwalli executed a pronote promising to pay the arrear of pay by instalment but upto this time nothing actually was done. I think therefore that this should be regarded as a Sunni Trust.

I must say in the end that from the reports that I have heard about the present Mutwalli, he is an opium addict (vide his statement flag Ez) and most unsuited to the proper performance of the duties expected of a Mutwali of an ancient and historic al mosque, which is not kept even in proper repares. It is desirable that, if possible, a committee of management should be appointed to supervise the proper maintenance and repairs of the mosque and discharge of his duties by the Mutwalli.”

26. From the second report of the Commissioner of Waqf, Faizabad being report dated 8th February, 1941 it becomes clear that the Imam was not being paid since 1930 and the alleged Mutwalli was an opium addict and most unsuitable person and in 1934 riots on 27th March, the alleged Mosque was demolished it can be safely inferred that Sri Ramjanamsthan temple structure was being used by the Hindus as their sacred place of worship and it was not being used as a mosque because it cannot be imagined that a person will discharge duty of imam without getting salary for such a long period as according to Islamic law, only salary is the prescribed means of livelihood no imam can survive for want of salary as such in fact neither there was any mosque nor there was any mutwalli or imam.
27. From exhibit-62 being page nos.367 to 405 of volume 12 of the documents filed in the instant suit which is a report of the four historians it becomes crystal clear that how said report has been prepared having some design in mind or inadvertently and negligently which reflects from page 397 of the said volume where the dimension of the vedi described by Tieffenthaler has been wrongly reproduced as “a square platform 5 inches above ground, 5 inches long and 4 inches wide, constructed of mud and covered with lime. The Hindus call it Bedi, that is to say, the birth place. The reason is that here there was a house in which Beschana (Bishan = Vishnu) took the form of Ram.” though correct dimension given by Tiffenthaler reads “a square chest, raised five inches from the ground, covered with lime, about five ells in length by not

more than four in breadth. The Hindoos call it bedi, the cradle; and the reason is, that there formerly stood here the house in which Beshan (Vishnoo) was born in the form of Ram." This correct translation is given in the book 'Modern Traveller' volume 3, published by James Duncan in 1828. It is crystal clear that in the report of said historians the word 'ells' has been translated as 'inches' in fact, ells means yards which has been correctly translated in the translation made available by the Govt. of India to this Hon'ble Court. Tieffenthelar has not stated that the Bedi was of mud, it is creation of the mind of the aforesaid historians, as such said report of the historians is not reliable for the reasons of being prepared by incompetent persons or for being biased, motivated.

28. The page No. 155 of volume 6 of the documents filed in the instant suit purported to be copy of a folio of a register contains a pedigree wherein it has been written that the mafi was created for the muezzin and khattib of masjid Babari of Oudh date and year of the waqf is unknown to Syed Baqi thereafter his son Syed (illegible) Ali, his son Syed Hussain Ali who was in possession for about 60 years now his son-in-law Rajab Ali and his daughter's son Muhammad Asgar are in existence and were in receipt of cash from village Shahnawa vide receipt (illegible) till fasali year 1263. In the year 1264 fasali enquiry about mafi was started but riot took place (illegible) crop (illegible) year 63 fasali was found (illegible) original (illegible) of and is document (illegible) in respect of mafi (illegible) settlement of village versus (illegible). A copy of the said contents has also been compiled in the said volume no.6 of the documents filed in the instant suit on its page nos.157 to 161
29. From the said enquiry report it appears that during the period of 332 years people of five generations including Syed Baqi held the office of muezzin and khattib of alleged Babri mosque during the period of 1528 to 1860 which means 66½ years was average of each generation which is quite impossible as according to Life Insurance Corporation's assessment average span of a change of generation is 26 years. And this pedigree is completely false, forged and fabricated one. During this period 16 generations of the Mughal rulers elapsed average whereof comes about 20¾ years. In the matter of *Radha Krishna v. State of Bihar* the Hon'ble Supreme Court has laid down the principle of law to evaluate and judge authenticity of a pedigree which has been reproduced in this argument at relevant place.
30. The alleged documents and/or transliteration thereof being page nos.53 to 61 of the volume no.6 of the documents filed in the instant suit tells that the alleged Babri Mosque was demolished by the rioters and Bairagis on 27th March, 1934. The damaged domes were beyond repair. The alleged list of damages says that apart from damaging the building, the Hindus either burnt or took away with them three pieces of mats, six pieces of mattress, one piece of box, two pieces sandal, six pieces of curtains, five pieces of pitchers, hundred pieces *badhana mitti* four pieces of small earthen pot, one piece *chahar*, water pot, (illegible) three pieces, *Kasauti Patthar Tarikhi*, 3 x 1½ sq. ft. one piece, ladder two pieces, large iron jar two pieces. From the said list it is crystal clear that no engraved stone i.e. inscription was either carried away by the rioters or destroyed by the rioters. As such the story of the destruction of inscription is wholly concocted and the inscription which was prepared by the

contractor was done at the instance of the Britishers to deprive the Hindus from their religious place and make the said place as bone of contention between Hindus and Muslims to facilitate their policy of divide and rule. As it has been written in the East-India Gazeteer 1828 p.352 2nd column last para as well as the preface of the Neil B.E. Baillie's Digest Of Moohummudan Law Vol.2 Edn.1875 | Intrduction p.xi & xii.

31. In Waqf Commissioner's report dated Feb. 8 1941, it has been recorded that the alleged Babri Mosque was built by one Abdul Baqi on being ordered to do so by the Emperor Babur. He records that there is no document to show that grant was sanctioned to the said Mosque either by the Mughal Emperors or Nawabs of Oudh, but as in 1864 a sunnud was issued stating that the grant was given to the grantee for rendering military, police and political services it may be presumed that it was granted in continuance of the grants of Mughal Emperors to Nawabs of Oudh right from the Emperor Babur. The said Commissioner in his waqf report has committed forgery and fabrication by inserting certain words in Urdu transcript to show that the grant was given for maintenance of the alleged Babri Mosque. In fact, said sunnud is on record and entire sunnud is in English language and nothing is written in the said sunnud in Urdu transcript as such question of grant for maintenance of Babri Mosque cannot and does not arise at all. He says that some return submitted in the office of Tahsildar in 1925 shows that though major expenses was done by the grantee for his own maintenance, but a portion thereof was spent on maintaining alleged Babri Mosque. Be it mentioned herein that if grant would have been spent on maintaining alleged Babri Mosque its account would have been submitted to the District Civil court which was made mandatory under the provisions of The Mussalman Wakf Act, 1923 under Section 3 of the said Act. Report also says that the Imam was not paid for last 11 years i.e. since 1930 as also that the Mutwalli is a drug addict and the alleged Mosque is in not good condition as such Mutwalli should be removed. A copy of the said report is on pages 44 to 48 of the Vol.6 of the documents filed in the instant Suit by the plaintiffs: Relevant extract from the said report has been reproduced in Para 24 herein above.

32. Section 3 of The Mussalman Wakf Act, 1923 (Act No.42 of 1923) reads as follows:

"3. Obligation to furnish particulars relating to wakf.- (1) Within six months from the commencement of this Act every mutawalli shall furnish to the court within the local limits of whose jurisdiction the property of the wakf of which he is the mutawalli is situated or to any one of two or more such courts, a statement containing the following particulars, namely:

(a) a description of the wakf property sufficient for the identification thereof;

(b) the gross annual income from such property;

(c) the gross amount of such income which has been collected furring the five years preceding the date on which the statement is furnished, or of the period which has elapsed since the creation of the wakf; which period is shorter;

(d) the amount of the Government revenue and cesses, and of all rents, annually payable in respect of the wakf property;

(e) an estimate of the expenses annually incurred in the realisation of the income of the wakf property, based on such details as are available of any such expenses incurred within the period of which the particulars under Cl.(c) relate;

(f) the amount set apart under the wakf for-

(i) the salary of the mutalalli and allowances to individuals;

(ii) purely religious purposes;

(iii) charitable purposes;

(iv) any other purposes and

(g) any other particulars which may be prescribed.

(2) Every such statement shall be accompanied by a copy of the deed or instrument creating the wakf or, if no such deed or instrument has been executed or a copy thereof cannot be obtained shall contain full particulars, as far as they are known to the mutawallis of the origin, nature and objects of the wakf.

(3) Where-

(a) a wakf is created after the commencement of this Act, or

(b) in the case of wakf, such as, is described in Sec.3 of the Wakf Validating Act, 1913 (6 of 1913), the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act, alive and entitled to claim any benefit thereunder.

The statement referred to in sub-section (10) shall be furnished in the case referred to in Cl.(a) within six months of the date of which the wakf is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in Cl.(b), within six months of the date of the death of the person entitled to such benefit as aforesaid or of last survivor of any such persons, as this case may be."

PART-XXVII

LIMITATION TO CHALLENGE COMMISSIONER'S REPORT NOT APPLICABLE TO STRANGER:

1. In AIR 2003 SC 2467 (*Karnataka Wakf Board. v. State Karnataka & Anr.*) the Hon'ble Supreme Court has held that in spite of declaration of property as wakf property under Section 6 of the Wakf Act, 1954, the limitation is not applicable against the plaintiffs who were stranger and not interested in the wakf. Relevant paragraph 12 of the said judgment reads as follows:

"12. According to the appellant's counsel, these suits, having been filed after a period of one year were not maintainable and they were barred by time. This plea was not accepted by the High Court, in our view, rightly, as the plaintiff in both these suits cannot be construed as 'persons interested in the Wakf.' It is pertinent to note that the Explanation to S. 6(1) was added by Act 69 of 1984. The Explanation is to the effect that the expression 'any person interested therein,' occurring in sub-section (1) of S. 6 and in sub-section (1) of S. 6-A, shall, in relation to a property specified as Wakf property in the list of Wakfs published, include every person who, though not interested in the Wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry. At the time when these plaintiffs filed the suit, they were strangers and they were not interested in the Wakf as such. The Explanation added to S. 6(1) can operate against these plaintiffs only after the insertion of the same in S. 6 of the Act. Prior to the insertion of the Explanation, a third party claiming independent title over a property, which is illegally included as Wakf property was entitled to file a suit within the period provided for under the Law of Limitation. Therefore, the inhibition provided under Proviso to S. 6 regarding the period of limitation was not applicable to the plaintiffs at the time when they filed the suits."

2. In AIR 2000 SC 3488 (*Punjab Wakf Board. Gram Panchayat*) the Hon'ble Apex Court has held that proviso to Section 6(1) of the Wakf Act, 1954 does not apply to the dispute which was not between wakif and mutawalli but with a stranger. Relevant paragraphs 21, 22 & 25 of the said judgment reads as follows:

"21. In the present case before us, therefore, the dispute not being one between the wakf and Mutawalli or the persons claiming under him, but with a stranger (the Panchayat) the decision in Sayyed Ali v. Wakf Board, Hyderabad, (1998) 2 SCC 542 : (1998 AIR SCW 736 : AIR 1998 SC 972) (supra) cannot be applied. Thus the said decision is clearly distinguishable and is not applicable to the facts before us. On the other hand, the present case before us is clearly covered by the decision of the three Judge Bench of this Court in Board of Muslim Wakf, Rajasthan v. Radha Kishan, (1979) 2 SCC 468 : (AIR 1979 SC 289), for the reasons given above."

22. We, therefore, hold that the first proviso to Clause (1) of Section 6 referred to above would not come in the way of the Assistant Collector and the Collector to decide, in the dispute raised by a third party like the Panchayat, whether the property is a modern Wakf or not.

25. In this connection, we have to point out that the Government of India has not issued any date for commencement of the Explanation in Section 6 of the Wakf Act quoted above. Even if it is assumed that the Explanation can be invoked, there is no material before us to show that any notice was issued to the Gram Panchayat before the issuance of the Notification, as required by the Explanation. If no notice was issued as required by the Notification, the Notification would not come in the way of a Civil Court to decide the question if raised between the Wakf and a third party, even if such a suit was filed beyond one year from the date of the Notification. Thus, once the Assistant Collector and the Collector had jurisdiction to decide, their decision became final and Section 13 of the Panchayat Act barred the Civil Suit filed by the Wakf Board."

3. In AIR 1979 SC 289 (*The Board of Muslim Wakfs, Rajasthan. v. Radhakrishna & Ors.*) the Hon'ble Supreme Court has held that the special rule of limitation laid down in proviso to sub-Section (1) of Section 6 is not applicable to a stranger who is a non-Muslim and is in possession of a certain property, his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for declaration if his title within a period of one year. Relevant paragraph 39 of the said judgment reads as follows:

"39. It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub-s. (1) of Sec. 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub-s. (2) of S. 5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises."

4. In AIR 1979 SUPREME COURT 289 "Board of Muslim Wakfs, Rajasthan v. Radha Kishan" the Hon'ble Apex Court has held that under the guise of judicial interpretation the Court cannot supply casus omissus. It is equally true that the Court in construing an Act of Parliament must always try to give effect to the intention of the legislature. Relevant paragraph 29 of the aforesaid judgment reads as follows:

"29. While it is true that under the guise of judicial interpretation the court cannot supply causes omissus, it is equally true that the courts in construing an Act of Parliament must always try to give effect to the intention of the legislature. In *Crawford v. Spooner* (1846) 6 Moo PC 1 the Judicial Committee said :

"We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and by construction, make up deficiencies which are left there."

To do so would be to usurp the function of the legislation. At the same time, it is well settled that in construing the provisions of a statute the courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective. Thus, an attempt must always be made to reconcile the relevant provisions so as to advance the remedy intended by the statute."

5. In AIR 1999 SC 3374 (*Wakf Board, Andhra Pradesh. v. Biradavolu Ramana Reddey*) the Hon'ble Apex Court has held that the service grant is not covered by the definition of public wakf, as such in suit to recover possession of such property, the extended period of limitation is not applicable. Relevant paragraphs 6, 7, 9, 10 and 12 of the aforesaid judgment reads as follows:

"6. A mere look at Section 3 of the Extension Act shows that it would be of any help if it is found that the possession of the land which was sought from the defendant belonged to a public wakf. The term 'public wakf' is defined in Section 2 of the said Act to mean permanent dedication by a person professing Islam of any immovable property for any purpose recognised by Muslim Law as a public purpose of a pious, religious or charitable nature. It cannot be disputed that the land in question which was sold by the then Paish Imam, Ghous Saheb in 1952 was a service Imam land granted to him for performing services as Paish Imam at the Mosque. It was not directly dedicated to the Mosque. Therefore as per the definition of Public Wakf the suit land being a service grant cannot be treated to be a public wakf. In this connection it is profitable to refer to the definition of 'wakf' as found in the Wakf Act, 1954. As per Section 3(1) of the said Act, the definition of 'wakf' is as under.

"3(1). 'wakf' means the permanent dedication by a person professing Islam or any other person of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-

- (i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;
- (ii) grants (including mashrut-ul-khidmat, muafies, Khairati, qazi services, madadmash for any purpose recognised by the Muslim law as pious, religious or charitable; and
- (iii) a wakf-alal-aulad;"

7. The aforesaid definition shows that at least from 1964 when sub-clause (ii) was added to the definition in Section 3(1) thereof, grants including mashrut-ul-khidmat were also to be treated as part of wakf. Apart from the question whether 1954 Act definition of wakf can be read with the definition of public wakf under the Extension Act, in 1952 when the first alienation by the Paish Imam took place even this definition was not available to cover the said transaction. But even proceeding on the basis that on the date of the suit, the definition of Wakf as per Wakf Act, 1954 was available for being pressed into service, it only treated mashrut-ul-khidmat, i.e. grant for rendering service to be Wakf. The Extension Act required the property to be of a public

wakf and not a mere wakf before Section 3 thereof can be pressed in service for extending the period of limitation. Consequently, on the express language of definition of public wakf as found in Section 3 of the Extension Act read with Section 3 thereof, the conclusion becomes inevitable that the extension of time would not be available to the appellant for challenging the alienations in question. It is obvious that suit property even if a wakf as per Wakf Act, 1954 as not within the sweep of the definition of a 'public wakf' as per the Extension Act wherein service grants are not treated to be public wakf. In view of our aforesaid conclusion it is not necessary for us to examine the other question whether the Extension Act could have been of any assistance to the learned counsel for the appellant for treating the suit to have been filed within limitation on account of Pongal holidays during which the Civil Courts were closed in Andhra Pradesh and after holidays the Courts reopened on 17-1-1973. It is also not necessary for us to examine the other question whether there was practice in the Civil Courts of Andhra Pradesh about reopening of the registry for filing of cases on a day previous to the date on which the Courts reopen after Pongal holidays. We keep this question open.

9. It becomes at once clear that 12 years period may be available from the date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is later provided the plaintiff challenges alienation by previous manager for valuable consideration. Learned counsel for the appellant was right when he contended that the present appellant Board got constituted when the Board came into existence on 4-3-1961 in the State of Andhra Pradesh. Even if that is so, and 12 years period is counted from that date, the nature of the suit must be such that the plaintiff therein must seek to recover possession of the property alienated by the previous manager such as Mutawalli or Sajjada Nashin. So far as Ghous Saheb was concerned, he was never the previous manager of the Mosque. He was merely a Paish Imam who could not be considered to be the previous manager. Hence alienation by him in 1952 cannot be said to be alienation by previous manager of the Mosque for valuable consideration. Therefore, Article 96 of the Limitation Act, 1963 also cannot be of any assistance to learned counsel for the appellant. In this connection our attention was drawn by learned senior counsel for the respondent to Article 134-B of the earlier Limitation Act, 1908, which reads as under.

Description of suit	Period of	Time from which begins to run
134-B - By the manager of Hindu, Mohammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The death, resignation or removal of the transferor.

10. The said provision is also in pari materia with slight modification with Article 96 of the present Act, the difference being that the limitation may also start from the date of appointment of a new Manager in the place of old one but still the requirement of both these Articles is that the impugned alienation must be effected by the previous manager. As we have already held that Ghous Saheb was not the previous Manager and he was only a Paish Imam neither Article 134-B of the old Act nor Article 96 of the Limitation Act, 1963 can be of any assistance to learned counsel for the appellant. These were the two provisions on which reliance was placed by the trial Court in holding the suit to be within the period of limitation. Both these provisions were not found by the High Court to be applicable. That view of the High Court is well sustained as we have already discussed. The inevitable result is that the suit filed by the appellant is to be treated to be barred by limitation.

12. A mere look at the said Act indicates that Sections 66-D to 66-H were brought on the statute of Wakf Act, 1954 by amending Act 69 of 1984. Since the present suit was filed in 1973 the said provision was not available to the appellant for getting the extension of period of limitation. Consequently, even this section can be of no avail to learned counsel for the appellant."

6. Be it mentioned herein that the Public Wakfs (Extention of Limitation) Act, 1959 is not applicable in the instant matter. For the reasons that the said extension Act is applicable in respect of the suits which are instituted for recovery of possession of the property of public wakf from which the said wakf had been dispossessed. But the instant suit has been filed seeking declaration that the disputed property is Babri mosque i.e. public wakf as such unless the said declaration is made, the said Act of 1959 has no application. Apart from this as no notification has been issued extending application of said Act in the State of Uttar Pradesh and the State of Uttar Pradesh at the relevant point of time had special legislation i.e. the United Provinces Muslim Waqfs Act, 1936 and on its being repealed the Uttar Pradesh Muslim Wakfs Act, 1960 as such where is special legislation general legislation shall not be applicable. The said Extension Act was applicable in those territories of Union of India where The Wakf Act, 1954 was in force.

PART - XXVIII

ADMISION OF /THE MUSLIMS THAT THE HINDUS WERE CONTINUOUSLY WORSHIPPING AT SRI RAMAJANMASTHAN TEMPLE AND THE MUSLIMS WERE INTURRUPTING THEM ONLY ON FRIDAYS AIDED BY THE ARMY OF NABABS OR THE BRITISH GOVERNMENT AND ULTIMATELY THE MUSLIMS DISCONTINUED THEIR SAID INTURRUPTION ON 16.12.1949:

1. Mohammad Hashim the plaintiff no.7 in the instant suit has deposed in Hindi as PW1 relevant portions whereof read as follows:

“a). If in a mosque there are figures of either human beings or of animals or birds then no prayer shall be offered therein (ibid p. 47 Line 11 & 12 from the top)

b). Above the Nothern doors of the disputed property there are two images of lions on both sides. (ibid p. 47 Line 1 & 2 of the last paragraph)

c). On the northern side of the disputed property there are several temples and habitation between the junction of the roads leading to a Unawal Temple and Kanak Temple. On the eastern side of the disputed property at very longest distances there is no Muslim habitation. (ibid p.52 L. 3, 4, 5)

d). Myself and Salar Mohammad had adopted the written statement filed by Anisur Rahman. We had admitted the same. (ibid p.52 L.8, 9, 10)

e). On being shown the photographs being paper Nos. 54A-2/41, 54A-2/42 and 54A-2/43 said plaintiff admitted that those photographs were of the Hindu Deities. (ibid P. 46 L.18-20 & P. 57 L.1)

f). The place where i pictures of the God, Goddesses, animals or the birds prayer cannot be offered because it is forbidden. (ibid P.77 L.12-15)

g). The riot of the 1934 was unilateral in which only Muslims had been killed no Hindu was killed. It is correct that at that time Hindus were more powerful and whenever they thought they subdued the Muslims. (ibid P.103 L. 1-3 of the last Paragraph)

h). If in any building or temple Idol is placed and worship and prayer is going on then there Namaz cannot be offered. Mosque cannot be built over a grave-yard. (ibid P.1-7, L. 10-12)

i). No prayer was offered on 23rd December 1949. In the month of October-November at the instance of Raghav Das the mosque was cordoned off from all four sides and had started *Kirtan* at Ganj-e-Shahidan. (ibid P.172 L. 15, 17 – 20)”

2. Farroqe Ahmed son of Zahoor Ahmed, the plaintiff no.10/1 in the instant suit has deposed in Hindi as PW3 relevant portions whereof read as follows:

“a). In the photograph which was seen by me and in which Saitan was came to sight was because the Saitan has human like feature with two big eyes whose hands and legs are in to and fro movement. (ibid P.82 last paragraph)

b). No mosque can be built in the place where is a grave. (ibid P. 96 L. 14)”

3. Sayyed Kalbe Jawad, a religious doctor has deposed in Hindi as PW26 relevant portion of his deposition made on 17.05.2002 reads as follows:

“a). Islam does not permit to engrave Idols or pictures of the Hindu Gods and Goddesses on the pillars inside a mosque.

4. In paragraph 7 of his written statement dated 8.7.1950/29.12.1950 filed in the proceeding under Section 145 Cr.P.C., 1898 Anisur Rahaman has stated that the party no.2 i.e. the Muslims of Ayodhya and other Muslims offered prayer in the building in question i.e. Babri Masjid till 16th December, 1949. In paragraphs 8 and 9 he states that on 12th November, 1949 the Hindus started *Jap* (repetition of a mantra or muttering of prayers) near the Babri Masjid wherein a large crowd of the Hindus gathered and they inflicted insult and humiliation upon *Quanati* Masjid and graves when this fact was informed to the district authorities they deployed a police guard and in view of apprehension of assault on Babri Masjid on 22nd November, 1949 the district authorities increased the number of the police guards. That Mohammad Hashim, the plaintiff No.7 in the instant suit in his written statement dated 09.04.1951 has adopted above-mentioned written statement of Anisur Rahaman which is on page 211 of volume 2 of the documents filed in the instant suit. The written statement of Anisur Rahaman is on page 215 to 219 of the volume no.2 of the documents filed.
5. From the aforesaid written statements of the Muslims it becomes crystal clear that according to their admission lastly prayer was offered on 16th December, 1949 and thereafter i.e. on and from 17th December, 1949 no prayer was offered and the possession of said Mosque was discontinued knowing fully well that the Hindu crowd which had surrounded the Babri Mosque since 12th November, 1949 would occupy the same. In view of such admitted facts if for the sake of argument for a moment it is assumed that the article 142 of the Limitation Act, 1908 is applicable in the instant case in that event the date of discontinuation i.e. 16th December, 1949 would be starting point of limitation under Article 142 of the Indian Limitation Act, 1908 and in that case also the suit is barred by limitation.
6. Jan Mohammed, Abdul Sattar, Abdul Gani, Rojid, Hosaldar, Ramzan, Gulle Khan, Md. Ismile Abdul Sakoor, Abdul Razaq, Naseebdar in their respective affidavits all dated 16.02.1950 have stated that the Babri Mosque was erected by demolishing Ramjanmabhumi temple but in spite of erection of said mosque the Hindus did not give up their possession and the Hindus were all along worshipping their idol therein. Muslims were able to offer prayer therein only on Fridays with the help of the forces of the Nawabs. In 1934 after the Hindu-Muslim riot the Muslims stopped going there in the mosque for the reason that in spite of killing three Muslims rioters were acquitted because the Muslims were apprehensive that going in mosque was risky for their lives. Since those days the Hindus have occupied principal place of the mosque and to read *namaz* on that place is against the Shar of Muslims. All those affidavits affirmed under order 19 Rule 1 of the Civil Procedure Code, 1908 and filed in

the court of learned City Magistrate, Faizabad in 145 Cr.P.C., 1898 proceeding of 1949 have been compiled in volume 2 of the documents filed in the instant suit as page nos.135 to 180.

7. Anisur Rahaman in his affidavit dated 5.4.1950 affirmed and filed in Cri Misc. Case No.208 of 1950 filed in the High Court of Judicature at Allahabad praying inter alia for transferring the said 145 Cr.P.C. proceedings being case no. of 1949 REX versus Anisur Ramaham to some other court of competent jurisdiction outside the district of Faizabad; has stated that on the 9th November, 1949 a crowd of five thousand Hindus collected and raised religious slogans and performed 'kirtan' and levelled down two tombs, 25 graves and one qanati mosque outside the compound of the alleged Babri mosque. Abhdey Ram Dass, Ramshukul Dass, Sheodarshan Dass and 50 or 60 other persons committed trespass into the Babri mosque and installed an idol in the mosque and thereby polluted 'napak' the mosque. In the said affidavit it has also been stated that the Muslims of the vicinity were at that time persuaded by the authorities not to say the prayers on that Friday. On 20.11.1949 the police advised the Muslim not to say their prayers in the surviving Babri mosque while the jap continued. In order to avoid a communal clash the Muslim acted on the advice and continued to say their prayers every Friday upto 16th December, 1949. Except for the Friday prayers the mosque used to be kept locked. A copy of said affidavit is on page nos.187 to 194 of volume no.2 of the documents filed in the instant suit. Relevant paragraph of the said affidavit reads as follows:

"2. That in Ajodhya there is a historical mosque built by Emperor Babar in 1528 A.D. called the Babari Mosque which has got a grant attached to it and is registered under the Waqf Act and the courtyard of the mosque is separate by a wall from a small temple which is situated to its East.

3. That Hindus and Muslims of Ajodhya have been peacefully and calmly carrying on their worship in the temple and prayers in the mosque respectively from time immemorial.

4. That on the 9th of November 1949 it was found that two tombs and about 25 graves which lay outside the compound of the Babri mosque had been leveled down and the mosque in the cemetery known as the "Qanati" mosque had been dug up and a new platform adjacent to the aforesaid mosque was constructed and an idol placed on that platform.

5. That from 22.11.1949 the Hindus of the place started their 'Jap' (worship) on that place in which a large number of Hindus were collected and for that reason the police advised the Muslims not to say their prayers in the surviving Babari mosque all the 5 times while the 'Jap' continued but continue it to Fridays only. In order to avoid a communal clash the Muslims acted on the advice and continued to say their prayer every Friday upto December 16, 1949. Except for the Friday prayers the mosque used to be kept locked and guarded by the police.

6. That on the night preceding the next Friday, namely the night between 22nd and 23rd December 1949 the Hindus surreptitiously and clandestinely introduced an ... inside the mosque itself and put it on the "member" (pulpit)"

8. The plaintiff no.4 of OOS No.4 of 1989 i.e. the instant suit Molvi Mohammad Faiq is defendant no.3 in OOS No.1 of 1989 and defendant No.7 in OOS No.3 of 1989; in paragraph 22 of his written statement dated 21.02.1950 filed in OOS No.1 of 1989 as also in paragraph 26 of his written statement dated 28.03.1960 filed in OOS No.3 of 1989 has admitted that in the alleged Babri Masjid the prayer was offered only till 16.12.1949.
9. The plaintiff no.10 of OOS No.4 of 1989 i.e. the instant suit Zahoor Ahemed is defendant no.1 in OOS No.1 of 1989; in paragraph 22 of his written statement dated 21.02.1950 filed in OOS No.1 of 1989 has admitted that in the alleged Babri Masjid the prayer was offered only till 16.12.1949.
10. The plaintiff no.1 of OOS No.4 of 1989 i.e. the instant suit U.P. Sunni Central Board of Waqfs is defendant no.9 in OOS No.3 of 1989; in paragraph 6 in its additional written statement dated 24.08.1995 filed in OOS No.3 of 1989 has adopted written statement of Molvi Mohammed Faiq and Zahoor Ahemed filed in OOS No.3 of 1989 and thereby it becomes admitted fact on part of the U.P. Sunni Central Board of Waqfs also that in the alleged Babri Masjid the prayer was offered only till 16.12.1949.
11. In (1901-02) 29 IA 24 the Hon'ble Privy Council held that the police report and orders for possession by Magistrates under Section 145 of Cr.P.C. are admissible in evidence under Section 13 being a "transaction" in which the rights or custom was claimed, modified, recognized, asserted or denied. Relying on the said judgment it is submitted that from the order of attachment dated 29.12.1949 passed by the Ld. City Magistrate Faizabad & Ayodhya in the proceeding under Section 145 of 1949 as well as police report, it is evident that the Hindus were in possession and they were worshipping in the disputed Sri Ramjanmasthan temple and were asserting their rights which fact is admissible evidence under Section 13 of the Evidence Act. Relevant portion from page 24 of the said judgment reads as follows:

"These police orders are in their Lordships' opinion admissible in evidence on general principles as well as under s. 13 of the Indian Evidence Act to shew the fact that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, namely, who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose, and to this extent, such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands referred in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, i.e., the testimony of persons who know the locality. If the orders refer to a map, that map is admissible in evidence to render the order intelligible; and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of the sort, be ascertained by extrinsic evidence. So far there appears to be no difficulty. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession: 2 Tay. Ev. s. 517.8 But they are not otherwise admissible unless they are made so by s.13 of the Indian

Evidence Act. To bring a report within that section the report must be "a transaction in which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence." These words are very wide, and are wide enough to let in the reports forming part of the proceedings in 1867, 1876, and 1888. Their Lordships are of opinion that the High Court did not err in receiving the report made in the proceedings of 1876 to the reception of which Mr. Cohen objected."

12. Sarkar's Law of Evidence, 15th Edn. Reprint 2003 published by Wadhwa and Company Nagpur in its Vol.1 on page 306 referring several Case laws conclude that the police reports, orders, affidavits etc. under Section 145 Cr.P.C. are admissible in evidence under Section 13 of the Indian Evidence Act, 1872. Relevant paragraph of the said book reads as follows:

"—Police Reports and Orders Under S. 145 Cr.P Code etc. — Police reports and orders for possession by magistrates under s 145 Cr P Code are admissible in evidence under s 13, being a "transaction" in which the right or custom wa claimed, modified, recognized, asserted or denied [Dinomoni v. Brojomohini, 29 IA 24:29C 187: 6 CWN 386:15 MLJ83 ante]. Such orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But as between parties to the proceedings they are also admissible as evidence as regards possession before two months of the date of the order [Jogendra v. Mohim, 34 CWN 358:57 C 987]. Such orders are admissible on general principles as well as under s 13 to show the fact that such orders were made [Hasim v. Abjal, 4 CLJ 30: 82 IC 392: A 1924 C 1046]. The facts of previous proceedings under s 145 and order thereon must be taken into consideration in a subsequent suit for possession based on the title [Boroda v. Manmatha, 41 IC 456]. Order under s 145 Cr P Code set aside by the High Court is admissible to show that possession was claimed by plaintiff who has complained of forcible dispossession [Devi v. Sisram, A 1939 L 188]. A judgment in a criminal case in which the plaintiff's assertion of possession was held to be with him is inadmissible against a person not a party to the criminal proceedings to prove plaintiff's possession at date of judgment, but it is admissible under s 13 to prove the assertion of plaintiff's title to the land at the date of judgment [Param v. Santosh, A 1942 P 372].

13. In 34 CWN 358 (*Jogendra v. Mohim*) the Hon'ble Calcutta High Court held that order passed under Section 145 Cr.P.C. are admissible against all persons when the fact of possession on the date of the order has to be asserted but as between parties to the proceedings they are also admissible as evidence as regards possession before two months of the date of the order. Relying on the said judgment it is submitted that from the orders passed in proceeding under section 145 Code of Criminal Procedure 1898 by the Magistrate are a piece of evidence which is to be looked into to ascertain the possession of the litigating parties and if they are looked into it becomes crystal clear that the Hindus were in possession before two months of the date of the order. Relevant extract from page 861 of the said judgment reads as follows:

“the order of the Magistrate is in the nature of a police order admissible as evidence of the fact as to who was declared entitled to retain possession; and these orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But as between parties to the proceedings they are also admissible as evidence as regards possession before two months of the date of the order, because if there had been a dispossession within 2 months of the date of the order when the proceedings were started, the Magistrate would have been bound to make over possession to the person who had been so dispossessed.”

14. In AIR 1924 Calcutta 1046 *Hasim Ali and others v. Abjal Khan and others* the Hon'ble High Court Calcutta held that the facts of initiation of proceeding under Section 145, Criminal Procedure Code, enquiry conducted therein, stands taken by the parties therein and orders passed therein are relevant facts and the same are admissible in evidence on general principles as well as under Section 13 of the Indian Evidence Act. Relevant extracts from page 1046 - 1047 of the said judgment read as follows:

“The appeal raises three points for consideration, namely, first, whether reliance should have been placed upon the proceedings in a case under section 145, Criminal Procedure Code; secondly whether the alleged title by adverse possession had been established ; and thirdly, whether the plaintiffs were entitled to a declaration of title to an unascertained share.

As regards the first point; it appears that the appellants were the first party in a proceeding under section 145, Criminal Procedure Code in 1916. Their case then, as now, was that they were entitled to the exclusive possession of the tank and that there was a likelihood of a breach of the peace as the second party (predecessors in interest of the defendants) claimed wrongful possession jointly with them. Upon investigation, the Magistrate came to the conclusion that the plaintiffs were not in exclusive but in joint possession, and that there was no likelihood of a breach of the peace. On these grounds proceedings were discontinued on the 22nd March 1917.

It is plain that the fact, that there was a proceeding under section 145, Criminal Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiffs, is a relevant fact, and the Subordinate Judge has properly treated this as evidence. The view of the Subordinate Judge is supported by the decision of the Judicial Committee in *Dinomoni Chowdhurani v. Brojomohini Chwdhurani* (1). In that case Lord Lindley pointed out that orders for possession under the provisions of the Criminal Procedure Code relating to disputes regarding immoveable properties are police orders made to prevent breaches of the peace and decide no question of title: but such orders are admissible in evidence on general principles as well as under Section 13 of the Indian Evidence Act to show the fact that such orders were made. Consequently, the first point must be decided against the appellants.”

...

“As regards the third point, Mr. Justice Walmsley has correctly held that the plaintiffs cannot claim a decree for declarations of title. The specific title alleged by them has not been established. On the other hand, the difficulty remains that the extent of their share cannot be determined on the evidence as it stands. In such circumstances, it is impossible to make a decree in favour of the plaintiff in respect of an unknown share.”

15. In 41 IC 456 (*Baroda v. Manmatha*) the Hon'ble Court held that the facts of previous proceedings under Section 145 Cr.P.C. and order thereon must be taken into consideration in subsequent suit for possession based on the title. Relying on the said judgment it is submitted that from the facts as stated in the affidavits of the persons through or under whom the present plaintiffs are claiming their right, title and interest, it becomes crystal clear that last prayer were offered on 16th December, 1949 and even prior to that date for last several months Muslims were unable to go to the disputed premises as large crowd of the Hindus were doing *kirtons* etc. and the learned Magistrate had directed them not to go their in group. In such circumstances it was not possible for any Muslim to go alone and offer prayer. From which it can be easily inferred that in fact from the several months back from 16th December, 1949, Muslims were unable to offer any prayer in the said disputed building.
16. In AIR 1942 Patna 372 (*Param v. Santosh*) the Hon'ble Patna High Court held that a judgment in a criminal case in which the plaintiffs' assertion of possession was held to be with him is inadmissible against a person not a party to the criminal proceedings to prove plaintiffs possession as date of judgment, but it is admissible under Section 13 to prove the assertion of plaintiffs' title to the land at the date of judgment. Relying on the said judgment it is submitted that the order passed in 145 Cr.P.C. proceedings is admissible under Section 13 to prove the claim of the Hindus' title to the land at the date of the said order. Relevant paragraph of the said judgment on its page 374 reads as follows:

“Now the defence in the present case was that at some time, more than forty years ago, the lands in dispute had fallen to the share of the defendants and they had been in possession ever since. They therefore alleged that the entry in the cadastral survey was wrong. The plaintiffs, on the other hand, denied the story of the defendants being in possession for the period of which the latter alleged, and the Court has found that the defence is entirely untrue in this respect. In coming to this conclusion, it has relied on a judgment of a criminal case of 1901 in which the plaintiffs asserted their possession of the land in dispute, and possession was held to be with them. Now if this judgment be admissible, it undoubtedly disproves the defendants' case, but it is contended that the judgment is inadmissible against the defendants who were not parties to the criminal proceedings. It is not the decision on which reliance can be placed to prove the plaintiffs' possession in 1901, but the fact that at that point of time they asserted their title is admissible under S. 13, Evidence Act. In my opinion, therefore, the

finding of the Court below is not vitiated by its reliance on the plaintiffs assertion of possession in 1901.”

17. Sections 8, 9 and 13 of the Evidence Act, 1872 in respect of relevant fact provides as follows:

8. Motive, preparation and previous or subsequent conduct.—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations

(a) *A* is tried for the murder of *B*.

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to extort money from *A* by threatening to make his knowledge public, are relevant.

(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

(c) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant.

(d) The question is, whether a certain document is the will of *A*.

The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) *A* is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence

of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A*'s presence—"the police are coming to look for the man who robbed *B*", and that immediately afterwards *A* ran away, are relevant.

(g) The question is, whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer, are relevant facts.

(h) The question is, whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) *A* is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is, not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

(k) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

9. Facts necessary to explain or introduce relevant facts.—Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A— "I am leaving you because B has made me a better offer". This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—"A says you are to hide this". B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

13. Facts relevant when right or custom is in question.—Where the question is as to the existence of any right or custom, the following facts are relevant:—

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father,

a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

(The Indian Evidence Act, 1872)

18. Order 19 Rule 1 of the Civil Procedure Code lays down that the Court may at any time order that any particular fact or facts may be proved by affidavit and Rule 3 thereof says that the facts as stated in the affidavit on the basis of deponent's own knowledge is admissible. As such the affidavits filed by the persons under or through whom the present plaintiffs are claiming are admissible as evidence in respect of relevant fact stated therein.

1. Power to order any point to be proved by affidavit.—Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

State Amendments

UTTAR PRADESH.—In Order XIX, in Rule 1, for the existing proviso, the following proviso shall be *substituted*, namely:

“Provided that if it appears to the Court, whether at the instance of either party or otherwise and whether before or after the filing of such affidavit, that the production of such witness for cross-examination is necessary and his attendance can be procured, the Court shall order the attendance of such witness, whereupon the witness may be examined, cross-examined and re-examined.”—U.P. Act 57 of 1976, Section 9. (1-1-1977).

High Court Amendments

ALLAHABAD.—After Rule 1 the following Rule 1-A shall be *inserted*:

“1-A. *Power to permit ex parte evidence on affidavit.*—Where the case proceeds *ex parte*, the Court may permit the evidence of the plaintiff to be given on affidavit.” (*Vide* Noti. No. 121/IV-h—36-D, dated Feb. 10, 1981 w.e.f. Oct. 3, 1981.)

3. Matters to which affidavits shall be confined.—(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.”

19. In AIR 1970 All 154 (*Ram Khelawan Bhagwati. v. Sundar Nankau & Anr.*) the Hon'ble Allahabad High Court has held that in a proceeding under Section 145 Cr.P.C., 1898, the Magistrate was empowered to direct to file affidavit. Relying on the said judgment it is submitted that as affidavit in the proceedings under Section 145 Cr. P.C. case of 1949 have been filed under order of the Magistrate the same are admissible evidence. Relevant paragraph nos.8 and 14 of the said judgment read as follows:

"8. Though the amendments made under this section in 1955 aimed at expeditious disposal of proceedings and for that purpose this section has been extensively amended, sub-section (9) has been retained in its old form. The newly added proviso to sub-section (4) empowered the Magistrate to summon and examine any person whose affidavit has been put in. He is also empowered under sub-section (9) to summon any witness at any stage of the proceedings on the application of either party. Neither in subsection (9) nor in the proviso to sub-section (4), a party has a right to examine a witness. In either case, the discretion lies with the Magistrate. When it is not possible for a party to obtain affidavits from persons who may be competent to speak about the possession, the Magistrate has the discretion to examine such persons as witnesses under sub-section (9). Our reasons for this view are, that the first proviso to sub-section (4) is quite independent of sub-section (9). That proviso would govern only sub-section (4) and not other sub-sections which follow it. The view that sub-section (9) was subject to the proviso to sub-section (4) would be violating all rules of interpretation of the statutes. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined only to that case. In AIR 1957 Bom 20, *Keshavlal Premchand v. Commissioner of Income-tax Bombay*, their Lordships observed :

"A proviso, which is in fact and in substance a proviso, can only operate to deal with a case which but for it would have fallen within the ambit of the section to which the proviso is a proviso, the section deals with a particular field and the proviso excepts or takes out or carves out from the field a particular portion, and therefore, it is perfectly true that before a proviso can have any application the section itself must apply. It is equally true that the proviso cannot deal with any other field than the field which the section itself deals with.....If a proviso is capable of a wider connotation and is also capable of a narrower connotation, if the narrower connotation brings it within the purview of the section, then the Court must prefer the narrower connotation-rather than the wider connotation.....".

The proviso to sub-section (4) of S. 145 confers a right on the Magistrate in suitable cases to summon and examine 'any person' whose affidavit has been put in as to the facts contained therein. This simply means, that where necessary, the Magistrate could summon and examine any person who has filed an affidavit in the case. That evidence is also to be confined to the facts mentioned in those affidavits. That contingency would arise only in the case of ambiguity in the affidavit filed by the parties witnesses. As stated earlier, this specific provision was made

by the amendment of 1955. Subsection (9) even existed prior to the amendment, and was allowed to continue. So, it could not be said that the same was redundant or superfluous. If that was so, the Legislature could have omitted it when drastic changes were made in Section 145. A plain reading of sub-s. (9) clearly indicates that it was quite independent of sub-section (4). It empowers the Magistrate where necessary 'at any stage' of the proceedings on the application of either party to summon 'any witness' directing him to 'attend or to produce any document or thing'. The words used in the proviso to sub-section (4) are 'any person' but in sub-section (9) the words are 'any witness'. The said proviso is restricted to the evidence of only those persons who have filed the affidavit. But sub-section (9) says that 'any witness' could be summoned at any stage. There is not the least indication that its scope is also confined only, to the persons who have filed affidavits in the case. 'At any' stage' occurring in the sub-section may even be prior to the filing of the affidavits. On the facts of the instant case, it is unnecessary to enter into the question whether the Magistrate has also the power to record the evidence of any witness summoned under that sub-section. As stated earlier, the request of the petitioner was only to summon the Lekhpal for filing an affidavit, but the Magistrate summarily dismissed the petition on the ground that there was no such provision under the existing law, which empowered him to summon any witness to file an affidavit. That power clearly existed under sub-section (9). So, we are convinced that the provisions of sub-s. (9) are quite independent of sub-section (4). In suitable cases, the Magistrate could summon any witness irrespective of the fact whether he has filed an affidavit in the case, and direct him to attend or produce any document or thing. In the circumstances, there was no bar to the Magistrate in summoning the petitioner's witness and directing him to file an affidavit.

14. In this view, we hold that the Magistrate clearly erred in summarily rejecting the application of the petitioner for summoning the Lekhpal and directing him to file an affidavit. He was fully competent under S. 145 (9) of the Cri. P. C. to have granted that prayer if it was necessary in the ends of justice and for proper decision of the rights of the parties. In the circumstances, the reference is allowed and the recommendation made by the Sessions Judge, Lucknow, is accepted. The order of the Magistrate dated 7th June, 1966 is quashed and he is directed to decide the application of the petitioner for summoning the Lekhpal on the merits."

20. In AIR 1963 All 256 (*Wahid & Anr. v. State*) the Hon'ble Supreme Court held that the Magistrate before whom the proceedings under Section 145 Cr.P.C. are pending is a person authorized to administer oath either by himself or by an official empowered by him in this behalf and the affidavits sworn according are admissible evidence. Relying on the said judgment it is submitted that as the affidavits of the persons under or through whom the plaintiffs are claiming were sworn before an official empowered by the Magistrate are admissible evidence and the facts stated therein that after the riots of 1934, the Muslims did not use to go to offer prayer in the said Mosque and the alleged Mosque

was being used as temple by the Hindus are relevant fact which can be inferred from their affidavits. Relevant paragraph nos.3, 5 and 6 of the said judgment read as follows:

“3. The first point that arises for consideration, therefore, is whether the affidavits filed by the parties were properly sworn and could be considered as proper evidence in the case. Under the provisions of S. 145, Cri. P. C., a party to the proceeding can adduce evidence of such persons as the party relies upon in support of his claim by putting in affidavits of those persons. The affidavits that were put in by Mahangi (first party) were verified and taken before an oath commissioner appointed by the High Court under S. 539, Cri. P. C. On the back of those affidavits there is a note of attestation. That note does not show on its face as to who is the attesting authority, because the designation of the person attesting is not written under the signatures. Under the signature of the authority attesting those affidavits we find only the date and another small initials. The signatures of the magistrate who tried the case, are on various other papers on the record. A comparison of the admitted signatures of the magistrate with the signatures on affidavits under the word “attested” clearly shows that the affidavits were attested by that very magistrate. The small initials under the date appear to be of the reader or other official of the magistrate’s Court who wrote the word ‘attested’.

Some of the affidavits filed by Wahid and Zahid (second party) appear to have been taken before a special magistrate. The view taken by the Sessions Judge is that the High Court has not appointed any commissioner or oath officer before whom an affidavit which is proposed to be filed before a magistrate can be sworn or affirmed. This view appears to be correct. The only provision in the Cri. P. C. regarding the mode of swearing affidavits and affirmations is to be found in S. 539. That section says that affidavits and affirmations which are to be used before any High Court must be sworn and affirmed before such Court..... or before any commissioner or other person appointed by the High Court for that purpose.... Section 539AA lays down that affidavits to be used before any Court other than a High Court under S. 510A or S. 539A may be sworn or affirmed in the manner prescribed in Section 539 or before any magistrate. A perusal of Ss. 539 and 539AA clearly shows that a commissioner or oath officer appointed by the High Court can have only such affidavits sworn before him as are to be used before the High Court or in the case of other Courts only those affidavits as are under S. 510A or 539A.

It is significant to note that in S. 539AA there is no mention of affidavits under S. 145. This clearly implies that an affidavit under S. 145 cannot be sworn or affirmed before a commissioner or oath officer appointed by the High Court. An examination of the provisions of various sections of the Cri. P. C. shows that affidavits are required to be filed under Sections 145, 510A, 526 and 539A. Section 526 provides for the transfer of a case by the High Court. An application for the exercise of the powers of transfer under S. 526 has, therefore, to be made in the High Court. Such an application is required to be supported by an affidavit

under the provisions of sub-s. (4) of S. 526. The affidavit referred to in that section has, therefore, to be filed before the High Court and can be sworn in the manner laid down in S. 539. Section 539A speaks of an affidavit in support of an application containing allegations against any public servant and Section 510A speaks of affidavits with respect to evidence of a formal character.

Proceedings requiring an affidavit under Sections 510A and 539A can be a Court other than a High Court. In view of S. 539AA such affidavits can be sworn in the manner prescribed in S. 539. In other words, such affidavits can be sworn before an oath commissioner or oath officer appointed by the High Court. If the legislature had intended that affidavits under S. 145 were also to be sworn in the manner prescribed in S. 539, a provision similar to the provision relating to affidavits under Ss. 510A and 539A would have been enacted by adding S. 145 in S. 539AA. The affidavits put in by Mahangi (first party) are, therefore, not proper affidavits in so far as they are sworn before an oath commissioner.

5. The magistrate before whom the proceedings were pending had a duty to decide the dispute between the parties with regard to the possession of the enclosure and it cannot be doubted for a moment that for the proper discharge of his duty the magistrate had an authority to receive evidence in the proceedings. He was, therefore, a person authorised to administer oath either by himself or by an official empowered by him in this behalf. The affidavits that were to be filed in the proceedings could, therefore, be sworn by the magistrate before whom the proceedings were pending decision.

6. The dictionary meaning of the word 'attested' is to testify, certify, put a person on oath or solemn affirmation. On the affidavit the word 'attested' above the signature of the magistrate, therefore, signifies that it was sworn before the magistrate. It may be that the magistrate might not have administered the oath himself to the person making the affidavit, but it is a well recognised practice that presiding officers of the Courts empower an official of their Court to administer oath and this they are entitled to do under the provisions of S. 4 of the Indian Oaths Act. The small initials under the date appear to be of an official of the magistrate's Court who was empowered to administer the oath. Affidavits for purposes of proceedings under S. 145 can be sworn before the magistrate in whose Court proceedings are pending.

It is not necessary that the magistrate should write in so many words 'affidavit sworn in my presence'. Mere attestation by the magistrate is sufficient to signify that the affidavit was sworn before him. As the affidavits put in by Mahangi (first party) were attested by the magistrate before whom the proceedings were pending, these affidavits were properly sworn and can be taken into evidence. The affidavits put in by the second party were sworn before another magistrate. That magistrate had no concern with these proceedings. The affidavits put in by the second party were not proper affidavits and could not be taken into evidence. The Sessions Judge was in error in considering

the affidavits filed by Mahangi which were attested by the magistrate, to be inadmissible in evidence. In view of the above discussion the affidavits put in by Mahangi (first party) are admissible and the affidavits put in by Wahid and Zahid (second party) are inadmissible as they were not properly sworn."

21. In AIR 1968 Bom 400 (*Lakshman Das. v. State*) the Hon'ble Bombay High Court held that facts necessary to explain or to introduce a fact in issue or relevant fact are relevant. Facts which support or rebut an inference suggested by a fact in issue or relevant facts are relevant; facts which establish an identity on anything or the person whose identity is relevant or fix the time or fix the place at which any fact in issue or relevant fact happened are relevant; facts which show the relation of party by whom in such fact was transacted are relevant. Relying on the said judgment it is submitted that the facts so far as they are necessary to ascertain the position of the parties in relating to possession of the suit premises or user of the suit premises are essential. Relevant paragraph 62 of the said judgment reads as follows:

"62. Facts necessary (1) to explain or (2) to introduce a fact in issue or relevant fact, are relevant; (3) facts (i) which support or (ii) rebut an inference suggested by a fact in issue or relevant facts are relevant; (4) facts (i) which establish the identity of anything or (ii) the person whose identity is relevant or (iii) fix the time or (iv) fix the place at which any fact in issue or relevant fact happened, are relevant; (5) facts which show the relation of parties by whom any such fact was transacted, are relevant. The last sentence is very important and it is, "in so far as they are necessary for that purpose", which means that if these facts are introduced in evidence, they can be used only for that purpose, and no other. Mr. Khandalwala suggests that the prior transactions of Hamad Sultan and the part played by Yusuf Merchant and, accused Nos. 6 and 14 in them is relevant to explain or introduce the facts in issue, and therefore, the evidence was admissible. It is difficult to sustain this part of the contention. To admit every such fact and require again a volume of proof in respect of the same would unnecessarily complicate matters; but he would seem to be right in the second part of his contention that in any event these facts are necessary in order to support the inference that the registration of the telegraphic address and the trips made by accused No. 6 and accused No. 14 to Delhi were in relation to these gold smuggling transactions, and riot innocent as sought to be made out on behalf of the accused the registration of the address and each trip being a relevant fact."

22. Section 145 and 146 of the XII of the Code of Criminal Procedure (Act V of 1898 from page Nos. 655 to 657 and page Nos. 712-713 of the Vol.1 of the Code of Criminal Procedure (Act V of 1898 published by the All India Reporter Ltd. Nagpur 1st Edn. 1935-36 read as follows:

"(1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing,

stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) the Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also, that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case, the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased

party for the purpose of such proceeding and all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to be produced under section 107."

146. (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof:

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure:

Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged."

THE SUIT IS BARRED BY ARTICLE 120 OF THE INDIAN LIMITATION ACT, 1908:

1. As the Suit property was attached in the proceeding under Section 145 of the Criminal Procedure Code, 1898 of 1949 vide order dated 29th December, 1949 passed by the Ld. City Magistrate Faizabad & Ayodhya and; the instant suit was filed on 18th December, 1961; the instant case falls within the perview of Article 120 of the Limitation Act, 1908. Article 142 and 144 of the said Act are not applicable in the instant matter. The above referred Articles reads as follows:

Description of Suit	Period of limitation	Time from which period begins to run
120. Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
142. For possession of immovable property when the plaintiff while in possession of the property has been dispossessed or had discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
144. For possession of immovable property or any interest therein not hereby otherwise apcially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

2. In AIR 1936 Oudh 387 Partab Bahadur Singh Vs. Jagatjit Singh the said Hon'ble Court held that where an order under Section 145 Criminal Procedure Code, 1898 was made by the Magistrate for attachment of the disputed property and the Tahsildar was appointed as receiver of the property, the possession of the receiver was in the eye of the law was the possession of the true owner therefore in such suit Article 120 of the Limitation Act, 1908 is applicable and a suit brought within six years of the last invasion is in time. Relevant portion of the said Judgement from its page 395 reads as follows:

“For the present it would be enough to say that in our opinion the attachment made in 1932 in pursuance of the order passed in the proceedings under S. 145, Criminal P. C., clearly gave rise to an independent cause of action for the plaintiff instituting the present suit for a declaration and the said suit having been throught within six years of the attachment is not barred by Art. 120, Limitation Act, if it is found that he had a subsisting title on the date of attachment. Next it was contended that the suit was governed by Art. 142 Sch. 1, Limitation Act, and that the plaintiff's suit had rightly been dismissed because he had failed to prove his possession within limitation. The Subordinate Judge also has laid great emphasis on it and his decision appears to be mainly based on this ground. In our opinion this position is altogether untenable. It is common ground between the parties that in S. 145 Criminal P. C., proceedings the Magistrate passed an order for attachment of the property. The Tahsildar who was appointed receiver took possession of the property on 23rd February, 1932. The property

was admittedly in possession of the Tahsildar as receiver at the time when the present suit was instituted. The possession of the receiver was in the eye of the law the possession the true owner. In the circumstances the plaintiff could undoubtedly maintain a suit for a mere declaration of his title and it was not necessary for him to institute a suit for possession. The suit is neither in substance nor in form a suit for possession of immoveable property. Art. 142 has therefore no application."

3. In AIR 1942 PC 47 Raja Rajgan Maharaja Jagatjit Singh Vs. Raja Partab Bahadur Singh the said Hon'ble Court upheld the ratio of law as laid down in AIR 1936 Oudh 387 Partab Bahadur Singh Vs. Jagatjit Singh. The Hon'ble Privy Council affirmed that in a suit for a declaration of plaintiff's title to the land in possession of the receiver under attachment in proceeding under Section 145 of the Criminal Procedure Code, 1898 by virtue of the Magistrate's order, Articles 142 and 144, the Limitation Act, 1908 do not apply and the suit is governed by Article 120 of the Limitation Act, 1908. Relevant portion of the said Judgement from its page 49 reads as follows:

"In the first place, their Lordships are clearly of opinion, contrary to the view of the Subordinate Judge, but in agreement with the view of the Chief Court, that it was for the appellant to establish that the title to the lands in suit held by the respondent's predecessor under the first settlement of 1865 had been extinguished under S. 28, Limitation Act, by the adverse possession of the appellant or his predecessors for the appropriate statutory period of limitation, completed prior to the possession taken under attachment on 23rd February 1932, by the Tahsildar, who thereafter held for the true owner. Their Lordships are further of opinion that the present suit, which was subsequently instituted, was rightly confined to a mere declaration of title, and was neither in form nor substance a suit for possession of immovable property.

In the second place, on the question of the errors of procedure of the Subordinate Judge in placing the burden of proving his possession within the limitation period on the respondent and ultimately refusing to allow the respondent to lead evidence in rebuttal of the appellant's evidence of adverse possession, it is enough to say that the appellant's counsel felt constrained to state that he could not defend the exclusion of evidence by the learned Judge, and that, if otherwise successful in his appeal, he should ask that the case should be remanded in order to give the respondent the opportunity which was so denied to him. The Chief Court held that the appellant had failed to prove adverse possession, and found it unnecessary to remand the case.

With regard to the statutory period of limitation, Art. 47 of the Act does not apply, as there has been no order for possession by the Magistrate under S. 145, Criminal P. C. As the suit is one for a declaration of title, it seems clear that Arts. 142 and 144 do not apply, and their Lordships agree with the Chief Court that the suit is governed by Art. 120. This leaves for consideration the main issue of proof of adverse possession by the appellant and his predecessors, and the appellant is at once

faced by a difficulty which proved fatal to his success before the Chief Court, viz., that unless he can establish adverse possession of the lands in suit as a whole, he is unable, on the evidence, to establish such possession of identified portions of the lands in suit. Before their Lordships, the appellant's counsel conceded that, in order to succeed in the appeal, he must establish adverse possession of the lands in suit as a whole. He further conceded that his case on that point rested either (a) on the Habibullah decision of 1899, on which he succeeded before the Subordinate Judge, or (b) on the compromised proceedings under S. 145 in 1903. He conceded that neither the Habibullah decision nor the boundary proceedings in 1903 amounted to a judicial decision. The appellant maintained that the Habibullah decision, given under S. 23 of the Act of 1876, was good evidence of the state of possession at that time, and of the possession of the whole of the land in dispute by Kapurthala. He maintained that it must be assumed that Mr. Habibullah did his duty and that the decision was based on actual possession; under S. 35, Evidence Act, it was good evidence of the fact of possession. Unfortunately for this contention it appears on the face of the judgment that possession was only proved in respect of land under cultivation, and that the boundary line laid down by Mr. Habibullah was largely an arbitrary line, and, at least to that extent, was not based on actual possession by Kapurthala, and it is well established that adverse possession against an existing title must be actual and cannot be constructive."

4. In ILR 26 Mad 410 RAJAH OF VENKATAGIRI -VS- ISAKAPALLI SUBBIAH AND OTHERS Certain lands were attached by a Magistrate, in 1886, under section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some income from them. Both claimants instituted, in 1897, suits in which each claimed the lands as his own, and sought to obtain a declaration of title to them, as well as to the accumulated income, with a view to obtaining possession of the lands and money from the Magistrate. On the question of limitation being raised the Hon'ble Madras High Court Held, that in so far as the suits were for declaration of title to immoveable property and the profits therefrom, they were governed by article 120 of schedule II to the Limitation Act and Article 142 and 144 were not applicable. Relevant portion of the said Judgement from its pages 415 and 416 reads as follows:

" In the present case the Magistrate acted in due course of law and, either because he found that neither party was in possession or because he was unable to satisfy himself as to which of them was then in possession, he has simply attached the property. Such attachment operates in law for purposes of limitation simply as detention or custody of the property by the Magistrate who, pending the decision by a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled, whether he be one of the actual parties to the dispute before him or any other person. For purposes of limitation the seizin or legal possession will, during the attachment, be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner, or to His discontinuing possession.

In each of the present suits, the plaintiff claims as the true owner and as being in legal possession – the physical possession by the Magistrate being one on behalf of the true owner- and prays for a declaration of his title, as against the defendant (the plaintiff in the other suit) who denies his title and claims the property as his own. Under section 146, Criminal Procedure Code, the Magistrate is bound to continue the attachment and have statutory possession of the lands for purposes of continuing the attachment until a competent Civil Court determines the rights of the parties to the dispute before him or the person entitled to the possession of the lands and he cannot deliver the property to any of the parties or other person without an adjudication by a Civil Court. During the continuance of the attachment, the legal possession for purposes of limitation will constructively be in the person who had the title at the date of the attachment and such title cannot be extinguished by the operation of section 28 of the Limitation Act, however long such attachment may continue.

In the above view article 144 will be even less applicable to the suit than article 142.

The suits, therefore, are essentially suits for declaration of title to immoveable property and the profits thereof which are in deposit, the plaintiffs respectively claiming to be in legal possession thereof and the period of limitation applicable is therefore the period of six years prescribed by article 120 of the second schedule to Act XV of 1877, which period is to be reckoned from the time when the right to sue accrued (*Pachamuthu Vs Chinnappan* (1), *Puraken V. Pareathi*(2) and *Muhammad Baqar V. Mango Lal*(3). In this view it is immaterial whether the Rajjah of Venkatagiri (the plaintiff in Appeal No. 149) was or was not actually a party to the dispute before the Magistrate in 1886. The right to sue certainly accrued on the date of the attachment, the 5th May, 1886, which is rightly given as the date of the cause of action in both the suits. The alleged wrongful denial, by the defendants in each case, of the plaintiff's title and possession and the procuring by such denial of the attachment by the Magistrate, in the cause of action for the declaratory suit and it is impossible to hold that there is a 'continuing wrong' within the meaning of section 23 of the Indian Limitation Act, during the time that the attachment continues so as to give for the purpose of reckoning the period of limitation a fresh starting point at every moment of the time during which the attachment continues."

5. In AIR 1925 Nagpur 236 *Yeknath Vs. Bahia* the said Hon'ble Court held that where there was a dispute between the parties regarding the land in suit and in proceedings under Chapter XII of the Criminal Procedure Code, 1898 the Magistrate attached the land under Section 146 and appointed a Receiver thereof, and where a suit was brought by the plaintiff for a declaration that he was the owner of the land Article 120 of the Limitation Act, 1908 applied to the suit and the period of Limitation starts from the date of the order of the attachment. Full text of the said Judgement from its page 236 reads as follows:

"In 1908 there was a dispute between the parties to the suit out of which this appeal arises regarding the land in suit and in proceedings under Ch. XII of Cr. P.C. Magistrate attached the land under S. 146 and appointed a Receiver thereof referring the parties to the Civil Court for the determination of their rights. The present suit was brought in 1920 by the plaintiff for a declaration that he was the owner of the land. The lower Appellate Court dismissed the suit on the ground that it was time-barred. The plaintiff challenges that finding in second appeal. The parties are agreed that Article 120 of the 1st Schedule, Limitation Act, applies to this case. The plaintiff however contends that the case being one of a continuing wrong the suit is within time. *Brojendra Kishore Roy Chaudhury V. Bharat Chandra Roy*(1), has been relied on by the plaintiff for the contention that there is a continuing wrong. But in that case it was found as a fact that the plaintiffs were in possession that the defendants attempted to interfere with their possession and a breach of the peace had become imminent when the property was attached by the Magistrate. In *Panna Lal Biswas V. Panchu Ruidas* (2), which is also relied on, the plaintiff was deprived of possession by the defendants two months prior to the attachment. There is no finding of either of these kinds in this suit. We do not know whether it was the plaintiff or the defendant who was guilty of interference with possession or dispossession. In the absence of all evidence as to the events preceding the attachment all that one can say as to what led the Magistrate to take possession is that it was either his inability to decide who was in actual possession or his decision that neither party was in possession. Neither of these can be said to be a wrong by the defendant. The alleged wrongful denial of the plaintiff's title was not what led the Magistrate to attach the property. The cases cited therefore do not help the plaintiff. In the circumstances of these cases it is the attachment by the Magistrate and not any wrongful act of the defendants that gave rise to the right to sue and the right accrued when the attachment was made. In this view no fresh period of limitation began to run under S. 23 of the Limitation Act after the date of the attachment by the Magistrate in 1908. The suit therefore was barred by time and was rightly dismissed. The appeal is dismissed with costs."

6. In AIR 1935 Madras 967 *Ponnu Nadar and others vs. Kumaru Reddiar and others* the said Hon'ble Court held that the real cause of action was the date of the order of the Magistrate and limitation started from the date of order and Article 120 of the Limitation Act, 1908 was applicable not the Section 23 of the said Act. The relevant portions of the said Judgement from its pages 970 and 973 read as follows:

"The question which we have to decide is one of limitation. The dispute has a somewhat long history, and we have to go back to 1900, when the Nadars of Mela Seithalai village attempted to carry a corpse in procession over the same route. The police reported that there was likely to be resistance on the part of the other caste people, and a breach of the peace, and accordingly the Joint Magistrate, Mr. Vibert, I.C.S., passed an order directing that no organized procession of Shanars

or Christians should pass along those streets until a Civil Courts had declared that there was a right to do so. It is not disputed that this order was passed under S. 147, Criminal P. C., although it may be open to some question whether the occasion was really appropriate for an order of this character, nor is it contended that the order was without jurisdiction and therefore a nullity. The contention of the defendants in the present suit is in brief that this order being still in force and no suit having been filed within the prescribed period by the Nadars to establish the right in question the present claim is time-barred. This point has been decided against the plaintiffs by the Courts below and the plaintiffs accordingly appeal.

.....

In the present case it is no doubt arguable that some analogy exists between an order which bars a right to take a procession and an obstruction which bars a right of way. Both in a sense create a state of affairs which continues to exist. What we have to find however is the existence of a "continuing wrong," a wrong, that is, originated by and kept in existence by the opposite party. What in fact appears to have given rise to the Joint Magistrate's order was a police report of an apprehended breach of the peace between the rival factions and all that the opposite party did was to adopt an attitude which gave rise to that apprehension. So far as that attitude itself is concerned, it is impossible to find in it a continuing wrong, nor do we find it easier to hold that when the Joint Magistrate passed the order with a view to prevent a breach of the peace there was a "continuing wrong" caused by the defendants' party. There is nothing to show that it was passed at their instance and even if it were, responsibility for passing it must be taken by the Court and not laid upon the party. Again, once an order was passed, the matter was taken out of the hands of the defendant party, and it lay with the Nadars themselves to establish their right by suit.

From this point of view too we are not disposed to hold that even if there was a continuing wrong the defendant party was responsible for its continuance. Where the applicability of S. 23, Lim. Act, is doubtful the proper course must be, we think, to enforce against the plaintiffs the ordinary principles of limitation, and in the present case to apply art. 47 would be applied to the case of an order under S. 145, Criminal P.C., time being taken to run from the date of the order. Adopting this view, the persons affected by the order of 1900 had a period of six years within which to establish their right, and we are not greatly impressed by the argument that, if the right itself may be indestructible, the remedy ought not to have been permanently lost by their failure to take action within that time. We must hold in agreement with 26 Mad 410(1) that the suit is barred under Art. 120, Limitation Act. The second appeal is dismissed with costs of the contesting respondents. We certify for a fee of Rs. 150 under R. 46, Practitioners' Fees Rules.

7. In AIR 1930 PC 270 (*Mt. Bolo. v. Mt. Koklan*) the said Hon'ble Court held that there can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to

infringe that right by the defendant against whom the suit is instituted. And in such suit limitation starts from the date of unequivocal threat to infringe the right for the purpose of limitation, the suit is governed under Article 120 of the Limitation Act, 1908. In the instant case, the plaintiffs' averment is that they were dispossessed in the night of 22/23rd December, 1949 and it is also admitted fact that an order of attachment in respect of the suit property was passed on 29th December, 1949 as such at least a clear and unequivocal threat to infringe the right of the plaintiffs to use the disputed structure as Mosque materialized in the night of 22/23rd December, 1949. On that date right to sue was arisen. Relevant paragraph of the said judgment from its page 272 reads as follows:

"There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. No doubt Mt. Koklan's right to the property arose on the death of Tara Chand, but in the circumstances of this case their Lordships are of opinion that there was no infringement of, or any clear and unequivocal threat to her rights till the year 1922, when the suit, as stated above, was instituted."

8. In AIR 1931 PC 9 (*Annamalai Chettiar & Ors. v. A.M.K.C.T. Muthukaruppan Chettiar & Anr.*) the Hon'ble Privy Council has held that in case of an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted for the purpose of limitation Article 120 of the Limitation Act, 1908 is applied. Relevant paragraph of the said judgment from page 12 reads as follows:

"In their Lordships view the case falls under Art. 120, under which the time begins to run when the right to sue accrues. In a recent decision of their Lordships' Board, delivered by Sir Binod Mitter, it is stated, in reference to Art. 120"

9. In AIR 1960 SC 335 (*Rukma Bai. v. Lala Laxminarayan*) the Hon'ble Supreme Court held that where there are successive invasion or denials of right, the right to sue under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question where that threat effectively invites or jeopardizes the said right. Relevant paragraph 33 of the said judgment reads as follows:

"33. The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said, right."

10. In AIR 1961 SC 808 (*C. Mohammad yunus. v. Syed Unnissa & Ors.*) the Hon'ble Supreme Court has held that a suit for declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Article 120. Under the said Article there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right. Relevant paragraph 7 of the said judgment reads as follows:

“7. The surplus income of the institution is distributed by the trustees and the plaintiffs are seeking a declaration of the right to receive the income and also an injunction restraining the defendant from interfering with the exercise of their right. The High Court held that plaintiff No. 1 was at the date of the suit 19 years of age and was entitled to file a suit for enforcement of her right even if the period of limitation had expired during her minority within three years from the date on which she attained majority by virtue of Ss. 6 and 8 of the Indian Limitation Act, Apart from this ground which saves the claim of the first plaintiff alone, a suit for a declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Art. 120 of the Limitation Act and in such a suit the right to sue arises when the cause of the action accrues. The plaintiffs claiming under Fakruddin sued to obtain a declaration of their rights in the institution which was and is in the management of the trustees. The trial judge held that the plaintiffs were not “in enjoyment of the share” of Fakruddin since 1921 and the suit filed by the plaintiffs more than 12 years from the date of Fakruddin’s death must be held barred but he did not refer to any specific article in the first schedule of the Limitation Act which barred the suit. It is not shown that the trustees have ever denied or are interested to deny the right of the plaintiffs and defendant No. 2; and if the trustees do not deny their rights, in our view, the suit for declaration of the rights of the heirs of Fakruddin will not be barred under Art. 120 of the Limitation Act merely because the contesting defendant did not recognise that right. The period of six years prescribed by Art. 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right. If the trustees were willing to give a share and on the record of the case it must be assumed that they being trustees appointed under a scheme would be willing to allow the plaintiffs their legitimate rights including a share in the income if under the law they were entitled thereto, mere denial by the defendants of the rights of the plaintiffs and defendant No. 2 will not set the period of limitation running against them.”
11. In AIR 1970 SC 1035 (*Garib Das. v. Munish Abdul Hamid*) the Hon'ble Supreme Court has held that in a suit for recovery of possession after cancellation of sale deed in favour of the defendants on the ground that a previous valid wakf had been created, Article 142 was not applicable, the suit was to be filed within a period of six years that is to say Article 120 was applicable. Relevant paragraph 13 of the said judgment reads as follows:

“13. The fourth point has no substance inasmuch as Article 142 of the Limitation Act was not applicable to the facts of the case. The suit was filed in 1955 within six years after the death of Tasaduk Hussain who died only a few months after the execution of the documents relied on by the appellants.”

12. In AIR 1973 All 328 (*Jamal Uddin. v. Mosque, Mashakganj*) the Hon'ble Allahabad High Court has held that in a suit for possession, the plaintiff specifically alleged that they had been dispossessed by the defendant before filing of the suit, the suit would be governed by Article 142 and the residuary Article 144 would have no application, then the burden in such a case was on the plaintiffs to prove their possession within 12 years before the suit. That case is distinguishable from this case because in that case no order of attachment was passed by the Magistrate, but in the instant case order of attachment was passed by the Magistrate and, as such, in the instant case Article 120 of the Limitation Act, 1908 is applicable. Relevant paragraph Nos.29 and 31 of the said judgment read as follows:

“29. The next point that was urged by the counsel for the appellants was that the courts below committed a legal error in applying Art. 144 of the Limitation Act, 1908, to the suit and placing the burden on the defendants to prove their adverse possession for more than twelve years, while the suit on the allegations contained in the plaint clearly fell within the ambit of Art. 142 and the burden was on the plaintiffs to prove their possession within twelve years. This contention also is quite correct. It was clearly alleged by the plaintiffs that they had been dispossessed by the contesting defendants before the filing of the suit. As such, the suit would be governed by Article 142 and the residuary Article 144 will have no application. The courts below have unnecessarily imported into their discussion the requirements of adverse possession and wrongly placed the burden on the defendant to prove those requirements. Now the trial Court has approached the evidence produced by the parties would be evident from the following observation contained in its judgment.

“The onus of proving adverse possession over the disputed land lies heavily upon the defendants and their possession has to be proved beyond doubt to be notorious, exclusive, openly hostile and to the knowledge of the true owner as laid down in AIR 1938 Mad 454.”

After a consideration of the documentary and oral evidence produced by the defendants to prove their possession the trial Court has opined that the document on record do not prove the title and possession of the defendants to the hilt in respect of the disputed land. So far as the plaintiffs' evidence is concerned it was disposed of by the trial Court with the following observations :

“..... No doubt, the oral evidence of the plaintiffs about the use of the land for saying the prayers of 'Janaze Ki namaz' and about the letting out of the land in suit for purposes of 'D or Sootana' is equally shaky and inconsistent. But as already pointed out above the plaintiffs have succeeded in proving their title over the disputed land and as such possession would go with the ownership of the land. The

defendants cannot be allowed to take advantage of the plaintiffs faulty evidence and it was for them to prove beyond any shadow of doubt that they were actually in possession over the disputed land as owners and that they exercised this right openly hostile to the plaintiffs with the latter's knowledge. Judged in this context, the evidence of the defendant falls short of this requirement."

31. The learned Civil Judge has noted in his judgment that this land was enclosed by walls which were occasionally washed away during rains but were rebuilt though it was not clear from the Commissioner's report as to when the existing walls had been constructed. It has also been found that the defendant-appellants and their predecessors had set up a barber's stall on this land by placing wooden Takhat on it on which they used to shave their customers and sleep thereon in the night. But they were of the opinion that these acts did not amount to dispossession of the plaintiffs. It was not noticed by them that it is an admitted fact that some windows of the mosque opened towards this land and so any activity of the defendant-appellants or their predecessors on this land could escape the notice of plaintiff No. 2 or his predecessor. According to the plaintiffs' allegations the defendants had simply started digging foundation on this land when they treated this act of theirs as amounting to their dispossession and filed their suit out of which this appeal has arisen. It is therefore clear that if the evidence had been appraised from a correct angle that the burden under Article 142 is on the plaintiffs, a finding could not be recorded in favour of the plaintiffs. On the other hand, from the facts and circumstances of the case, it was evident that the plaintiffs or their predecessors-in-interest had no possession over the land within twelve years prior to the suit. The suit was therefore barred by limitation under Article 142."

13. In AIR 2004 SC 1330 (*Chairman & MD, N.T.P.C. Ltd.. v. M/s. Reshmi Construction Builders & Contractors*) the Hon'ble Apex Court has held that no one can be allowed to approbate and reprobate at the same time. In view of such principle of law, the plaintiffs are estopped from relying on applicability of Article 142 on one hand and Article 144 on the other. Article 142 is applicable for recovery of possession of immovable property when the plaintiff's possession of the property has been dispossessed or had discontinued. Under this Article the burden of proof lies upon the plaintiffs to prove their possession within 12 years before the suit. While Article 144 is a residuary and which is applicable for recovery of possession of immovable property or an interest therein not specifically provided for by the Act and in that case burden of proof lies upon the defendants to prove their possession within 12 years before the suit. Relevant paragraph Nos.36 and 37 of the said judgment read as follows:

"36. In Halsbury's Laws of England, 4th Edition, Vol. 16 (Reissue) para 957 at page 844 it is stated :

"On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions :

- (1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.”

37. In American Jurisprudence, 2nd Edition, Volume 28, 1966, pages 677-680 it is stated :

“Estoppel by the acceptance of benefits :

Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience.”

14. In AIR 1983 SC 684 = (1983) 3 SCC 118 (*State of Bihar. v. Radha Krishna Singh*) the Hon'ble Supreme Court has held that the statement made *post litem motam* is inadmissible on the ground the same thing must be in controversy before and after the statement is made. In view of the said judicial pronouncement, the statements of the plaintiffs which have been made in their written statement filed in the year 1950 in O.S. No.1 of 1989 to the effect that last *namaz* was offered on 16th December, 1949 and thereafter no *namaz* was offered is *ante litem motam*. In the same suit same thing is/was in controversy before and after the statement was made. The plea taken in the plaint of the instant suit being O.S.No.4 of 1989 to the effect that the disputed structure was used as Mosque till 22/23rd December, 1949 and on that date last *namaz* was offered is *post litem motam* which is inadmissible. As such on the basis of admission of the plaintiffs they have admitted that they discontinued in possession on or after 16th December, 1949 and, as such limitation starts from that day. Relevant paragraph Nos.132 and 138 of the said judgment read as follows:

“132. Same view was taken by a Full Bench of the Madras High Court in Seethapati Rao Dora v. Venkanna Dora (1922) ILR 45 Mad 332 : (AIR 1922. Mad 71), where Kumaraswami Sastri. J. observed thus :

“I am of opinion that Section 35 has no application. to, judgments, and a judgment which would not be admissible under Sections 40 to 43 of the Evidence Act would not become relevant merely because it contains a statement as to a fact which is in issue or relevant in a suit between persons who are not parties or privies. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments in Courts of justice.”

138. In Hari Baksh v. Babu Lal AIR 1924 PC 126, their Lordships observed as follows:

“It appears to their Lordships that these statements of Bishan Dayal who was then an interested party in the disputes and was then taking a position adverse to Hari Baksh cannot be regarded as evidence in this suit and are inadmissible.”

PART - XXX

INGREDIENTS OF ADVERSE POSSESSION NEITHER HAVE BEEN PLEADED NOR HAVE BEEN PROVED, PLAINTIFF CAN NOT BE ALLOWED TO CLAIM RELIEF BASED ON TITLE UNDER OR THROUGH EMPEROR BABUR ON ONE HAND WHILE ON OTHER HAND SEEKING CLAIM DENYING THE TITLE OF SAID EMPEROR MOREOVER BEING INCONSISTENT PLEA OF ADVERSE POSSESSION THE INSTANT SUIT IS LIABLE TO BE DISMISSED:

1. In AIR 2009 SC 103 (*Hemaji Waghaji Jat. v. Bhikhabhai Khengarbhai Harijan & Ors.*) the Hon'ble Supreme Court has held that a plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued and (e) his possession was upon and undisturbed. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. It is important to clearly plead and establish all facts necessary to establish his adverse possession. Relying on said judgment of the Hon'ble Supreme Court it is submitted that in their plaints, the plaintiffs have not stated that on what date they came into possession, what was the nature of their possession, whether the factum of possession was known to the other party and how long their possession has continued and their possession was upon and undisturbed. In the instant case the plaintiffs having failed to plead the case of adverse possession and having miserably failed to establish title to the suit property, the suit for declaration and possession is not fit for being decreed on the ground of adverse possession. Relevant paragraph Nos.11, 15, 18, 32, 34 and 36 of the said judgment read as follows:

“11. We deem it appropriate to deal with some important cases decided by this court regarding the principle of adverse possession.

15. The facts of *R. Chandavarappa and Others v. State of Karnataka and Others* (1995) 6 SCC 309 are similar to the case at hand. In this case, this court observed as under :-

“The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant.”

18. In *Karnataka Board of Wakf v. Govt. of India* (2004) 10 SCC 779 at para 11, this court observed as under :-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show : (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

32. Reverting to the facts of this case, admittedly, the appellants at no stage had set up the case of adverse possession; there was no pleading to that effect, no issues were framed, but even then the trial court decreed the suit on the ground of adverse possession. The trial court judgment being erroneous and unsustainable was set aside by the first appellate court. Both the first appellate court and the High Court have categorically held that the appellant has miserably failed to establish title to the suit land, therefore, he is not entitled to the ownership. We endorse the findings of the first appellate court upheld by the High Court.

34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally, taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of

India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.

2. In AIR 1935 PC 53 (*Ejas Ali Qidwai & Ors. v. The Special Manager, Court of Wards, Balarampur Estate & Ors*) the Hon'ble Privy Council held that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In the said judgment it has also been held that the expression 'ordinary law' under Section 23 of the Oudh Estates Act of 1869 includes such customs as may be found to exist. In the instant case, the plaintiffs have failed to take the plea and prove by unequivocal evidence that their possession was hostile to the real owner which amounted to a denial of real owner's title to the property claimed. Be it mentioned herein that as the plaintiffs have not disclosed in their plaint the name of the real owners, they have failed to satisfy the first ingredients of adverse possession. As such, the suit is liable to be dismissed on this score alone. Relevant paragraph from page 56C1 of the said judgment reads as follows:

"Wazir Ali died, his son Hashmat Ali was an infant of tender years, and was unable to manage the estate. There was therefore an additional reason why Nawazish Ali, who satisfied the requirements of the family usage, should be entrusted with the management of the taluka. There can be little doubt that he obtained possession with the consent of all the persons interested in the estate, and his possession was, at its inception, merely permissive. It is not suggested that there was any subsequent change which converted it into adverse possession. The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. This onus the appellants have failed to discharge. Neither the entry of Nawazish Ali's name in the revenue records as the owner of the taluka, nor his possession thereof, could, in the circumstances of the case, affect the title of the person or persons who had the right to inherit it. The acquisition of title by adverse possession was the only point urged in support of the appellants' claim to a share in the villages constituting the taluka, and in their Lordships' opinion that issue has been rightly decided against them.

Their Lordships have still to determine the question of succession to the villages which, though not forming part of the original taluka, were included in the mortgage deeds. These villages were acquired by the holders of the taluka on various occasions, and it was argued that they, being non-talukdari property, descended on the death of Asghar Ali, not to Iqbal Ali alone, but to all the persons who were the heirs of the deceased according to the Mahomedan law. As laid down by the twenty-third section of the Oudh Estates Act, succession to such property is regulated by the ordinary law, but the expression "ordinary

law” includes such custom as may be found to exist. Now, the Courts in India have concurred in holding that the custom of the devolution of non-talukdari property upon a single heir has been established, and their Lordships can see no valid reason for dissenting from that conclusion. The second list framed under S. 8 of the Act contains a recital of the family custom by which the estate is inherited by a single heir, but this recital is conclusive evidence only as to the talukdari property. As regards the other property, it merely raises a presumption in favour of the existence of the custom, but the presumption can be rebutted. The appellants however did not offer any evidence to show that the descent of the property other than the taluka was regulated by a different rule. No distinction appears to have been made between the taluka and the other property in the matter of succession, and both of them were treated in the same manner.”

3. In AIR 2008 SC 346 (*Anna Kili. v. A. Vedanayagam & Ors.*) the Hon’ble Apex Court has held that in respect of adverse possession not only *animus possidendi* must be shown to exist but the same must be shown to exist at commencement of possession. The claimant must continue in said capacity for the period prescribed under Limitation Act and mere long possession for a period of more than 12 years without anything more would not ripen into title. In the instant suit, the plaintiffs have neither proved the existence of *animus possidendi* at commencement of their possession nor have they proved continuance of their possession in such capacity. The suit on the ground of adverse possession is liable to be dismissed. Be it mentioned herein that before the annexation of Oudh to British India of East India Company, the law of *Shar* was the law of the land and was in force and as *Shar* did not recognize adverse possession and limitation is alien to said law at least till 1856, they had no right to claim ownership on the basis of adverse possession. Be it mentioned herein that in paragraph 26 of the said judgment, the Hon’ble Supreme Court has held that the person who is claiming benefit of Article 142 or 144 of the Limitation Act, 1908, he is bound to prove his title as also possession within 12 years preceding the date of the institution of the suit. Relevant paragraphs 22 and 26 of the said judgment read as follows:

“22. Claim by adverse possession has two elements : (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. *Animus possidendi* as is well known is a requisite ingredient of adverse possession. It is now a well settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have *animus possidendi* and hold the land adverse to the title of the true owner. For the said purpose, not only *animus possidendi* must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not ripen into a title.

26. We may also notice that this Court in *M. Durai v. Muthu and Ors.* [(2007) 3 SCC 114], noticed the changes brought about by Limitation

Act, 1963, vis-a-vis, old Limitation Act, holding : 2007 AIR SCW 6248

“The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.”

4. In AIR 2007 SC 1753 (*P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors.*) the Hon'ble Apex Court has held that adverse possession is a right which comes into play not just because someone loses his right to reclaim his property out of continuance and wilful negligence but also on the ground of possessor's positive intent to dispossess. As the right of property is not only a constitutional or statutory right but also a human right. It has also been held that intention to possession cannot be substituted for intention to dispossession which is essential to prove adverse possession. Thus, there must be intention to dispossess and it needs to be open and hostile enough to bring the same to the knowledge to give the owner an opportunity to object. Applying the said principle pronounced by the Hon'ble Supreme Court of India, in the instant case we find that the plaintiffs have neither pleaded nor have proved by evidence that they had intention to dispossess the real owner as name of the real owner itself does not find place in the four corner of the plaint. As such the said suit is liable to be dismissed. Relevant paragraphs 12 and 32 of the said judgment reads as follows:

“12. This brings us to the issue of mental element in adverse possession cases-intention.

1. Positive Intention

The aspect of positive intention is weakened in this case by the sale deeds dated 11.04.1934 and 5.07.1936. Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts limitation act and it also assists the court to unearth as the intention to dispossess.

At this juncture, it would be in the fitness of circumstances to discuss intention to dispossess vis-a-vis intention to possess. This distinction can be marked very distinctively in the present circumstances.

Importantly, intention to possess can not be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the

variety and degree which is required for adverse possession to materialize.

The High Court observed:

“It is seen from the pleadings as well in evidence that the plaintiff came to know about the right of the defendants’, only when disturbances were sought to be made to his possession.”

In similar circumstances, in the case of *Thakur Kishan Singh (dead) v. Arvind Kumar* [(1994) 6 SCC 591] this court held: 1994 AIR SCW 4082, Para 5

“As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse.”

The present case is one of the few ones where even an unusually long undisturbed possession does not go on to prove the intention of the adverse possessor. This is a rare circumstance, which Clarke LJ in *Lambeth London Borough Council v. Blackburn* (2001) 82 P and CR 494, 504 refers to:

“I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention.”

On intention, *The Powell v. Macfarlane* (1977) 38 P and CR (Property, Planning and Compensation Reports) 452-472 is quite illustrative and categorical, holding in the following terms:

“If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (‘animus possidendi’).”

If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.

.....

In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.

...

What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

Intention implies knowledge on the part of adverse possessor. The case of *Saroop Singh v. Banto and Others* [(2005) 8 SCC 330] in that context held: 2005 AIR SCW 5314, Paras 27, 28

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See *Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak*) 2004 AIR SCW 1704 .

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See *Mohd. Ali v. Jagadish Kalita*, SCC para 21.)"

A peaceful, open and continuous possession as engraved in the maxim *nec vi, nec clam, nec precario* has been noticed by this Court in *Karnataka Board of Wakf v. Government of India and Others* [(2004) 10 SCC 779] in the following terms:

“.....Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.....”

It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

In *Narne Rama Murthy v. Ravula Somasundaram and Others* [(2005) 6 SCC 614], this Court held:

“However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter.”

The test is, as has been held in the case of *R. v. Oxfordshire County Council and Others, Ex Parte Sunningwell Parish Council* [1999] 3 ALL ER 385; [1999] 3 WLR 160:

Bright v. Walker (1834) 1 Cr. M. and R. 211, 219, “openly and in the manner that a person rightfully entitled would have used it. . .” The presumption arises, as Fry J. said of prescription generally in *Dalton v. Angus* (1881) 6 App.Cas. 740, 773, from acquiescence.

The case concerned interpretation of section 22(1) of the Commons Registration Act 1965. Section 22(1) defined “town or village green” as including

".....land..... on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years."

It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The court observed:

"the words 'as of right' import the absence of any of the three characteristics of compulsion, secrecy or licence 'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements."

Later in the case of *Beresford, R (on the application of) v. City of Sunderland* [2003] 3 WLR 1306, [2004] 1 All ER 160 same test was referred to.

Thus the test of *nec vi, nec clam, nec precario* i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

In *Karnataka Wakf Board (Supra)*, the law was stated, thus:

"In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : *S M Karim v. Bibi Sakinal* AIR 1964 SC 1254, *Parsinni v. Sukhi* (1993) 4 SCC 375 and *D N Venkatarayappa v. State of Karnataka* (1997) 7 SCC 567). Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature

1993 AIR SCW 3606

1997 AIR SCW 2947 of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

2. Inquiry into the particulars of Adverse Possession

Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in *S.M. Karim v. Mst. Bibi Sakina* [AIR 1964 SC 1254]: Para 5

“Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for “several 12 years” or that the plaintiff had acquired “an absolute title” was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea.”

Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

In *Karnataka Wakf Board* (Supra), it is stated:

“Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In *P Periasami v. P Periathambi* (1995) 6 SCC 523 this Court ruled that - “Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.” The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with *Mohan Lal v. Mirza Abdul Gaffar* (1996) 1 SCC 639 that is similar to the case in hand, this Court held: 1996 AIR SCW 306, Para 4

“As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant’s claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.”

3. New Paradigm to Limitation Act

The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of

Articles 64 and 65 of the Limitation Act, 1963, the legal position has undergone complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in *S.M. Karim v. Mst. Bibi Sakina* [AIR 1964 SC 1254] in the following terms: Para 5

“.....Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.....”

[See also *M. Durai v. Madhu and Others* 2007 (2) SCALE 309]

The aforementioned principle has been reiterated by this Court in *Saroop Singh v. Banto and Others* [(2005) 8 SCC 330] stating: 2005 AIR SCW 5314

“29. In terms of Article 65 the starting point of limitation does not commence from 2004 AIR SCW 1704 the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See *Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak*)

30. *Animus possidendi* is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See *Mohd. Mohd. Ali v. Jagadish Kalita*, SCC para 21.)”

In *Mohammadbhai Kasambhai Sheikh and Others v. Abdulla Kasambhai Sheikh* [(2004) 13 SCC 385], this Court held:

“.....But as has been held in *Mahomedally Tyebally v. Safiabai* the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Therefore, unless the defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiff's claim.....”

The question has been considered at some length recently in *T. Anjanappa and Others v. Somalingappa and Another* [(2006) 7 SCC 570], wherein it was opined : 2006 AIR SCW 4368

“The High Court has erred in holding that even if the defendant's claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner

and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable....."

[See also *Des Raj and Ors. v. Bhagat Ram (Dead) by LRs. and Ors.*, 2007 (3) SCALE 371; *Govindammal v. R. Perumal Chettiar and Ors.*, JT 2006 (10) SC 121 : (2006) 11 SCC 600] 2007 AIR SCW 1560

2006 AIR SCW 5794

32. Are we to say that it is a sale with doubtful antecedents (1 acre 23 Guntas) sought to be perfected or completed through adverse possession? But that aspect of the matter is not under consideration herein. As has already been mentioned, adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Therefore it is important to take into account before stripping somebody of his lawful title, whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the paper-owner of the property. This test forms the basis of decision in the instant case."

5. In 2006 AIR SCW 4368 (*T. Ajasnappa & Ors. v. Sonalingappa & Anr.*) the Hon'ble Supreme Court has held that adverse possession means hostile possession which is exclusively or impliedly in denial of title of true owner. Even if defendants claim adverse possession, they still have to prove who is true owner if they are not sure who is true owner, the question of their being in hostile possession and question of denial of title of true owner do not arise. Relying on said Judgment it is submitted that the plaintiffs are not sure who is true owner of the suit property and also that they have failed to prove who is true owner, and as such, the instant suit is liable to be dismissed. Relevant paragraph Nos.12 to 23 of the said judgment reads as follows:

"12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

13. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. It is a matter of

fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owner. (See *Vidya Devi v. Prem Prakash and Ors.* 1995 (4) SCC 496). 1995 AIR SCW 2808

14. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful Owner's title e.g. trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession.

15. "Adverse possession" means a hostile possession which is expressly or impliedly in denial of title of the true owner. Under Article 65 of the Limitation Act, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. (See *Annasaheb v. B.B. Patil* AIR 1995 SC 895 at 902). 1995 AIR SCW 709, Para 12

16. Where possession could be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.

17. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner (that is, with the intention of excluding all persons from it, including the rightful owner), he is in adverse possession of it. Thus, if A is in possession of a field of B's, he is in adverse possession of it unless there is something to show that his possession is consistent with a recognition of B's title. (See *Ward v. Carttar* (1866) LR 1 Eq.29). Adverse possession is of two kinds, according as it was adverse from the beginning, or has become so subsequently. Thus, if a mere trespasser takes possession of A's property, and retains it against him, his possession is adverse ab

initio. But if A grants a lease of land to B, or B obtains possession of the land as A's bailiff, or guardian, or trustee, his possession can only become adverse by some change in his position. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title, but also, if the adverse possessor remains in possession for a certain period of time produces the effect either of barring the right of the true owner, and thus converting the possessor into the owner, or of depriving the true owner of his right of action to recover his property and this although the true owner is ignorant of the adverse possessor being in occupation. (See *Rains v. Buxton*, 1880 (14) Ch D 537).

18. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of any person to whom the land rightfully belongs and tends to extinguish that person's title, which provides that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the time when the right first accrued, and does away with the doctrine of adverse possession, except in the cases provided for by Section 15. Possession is not held to be adverse if it can be referred to a lawful title.

19. According to Pollock, "In common speech a man is said to be in possession of anything of which he has the apparent control or from the use of which he has the apparent powers of excluding others".

20. It is the basic principle of law of adverse possession that (a) it is the temporary and abnormal separation of the property from the title of it when a man holds property innocently against all the world but wrongfully against the true owner; (b) it is possession inconsistent with the title of the true owner.

21. In Halsbury's 1953 Edition, Volume-I it has been stated as follows:

"At the determination of the statutory period limited to any person for making an entry or bringing an action, the right or title of such person to the land, rent or advowson, for the recovery of which such entry or action might have been made or brought within such period is extinguished and such title cannot afterwards be reviewed either by re-entry or by subsequent acknowledgement. The operation of the statute is merely negative, it extinguished the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of the others to eject him".

22. It is well recognized proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the

true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

23. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable. Therefore, the appeal which relates to OS 168/85 is allowed by setting aside the impugned judgment of the High Court to that extent. Equally, the High Court has proceeded on the basis that the plaintiff in OS.286/88 had established his plea of possession. The factual position does not appear to have been analysed by the High Court in the proper perspective. When the High Court was upsetting the findings recorded by the court below i.e. first appellate Court it would have been proper for the High Court to analyse the factual position in detail which has not been done. No reason has been indicated to show as to why it was differing from the factual findings recorded by it. The first appellate Court had categorically found that the appellants in the present appeals had proved possession three years prior to filing of the suit. This finding has not been upset. Therefore, the High Court was not justified in setting aside the first appellate Court's order. The appeal before this Court relating to O.S. 286 of 1988 also deserves to be allowed. Therefore, both the appeals are allowed but without any order as to costs."

6. In AIR 2004 SC 3782 (*Amarendra Pratap Singh. v. Tej Bahadur Prajapati & Ors.*) the Hon'ble Supreme Court has held that a general law cannot defeat the provision of special law to the extent to which it was in conflict; else an effort has to be made at reconciling the two provisions of by homogeneous rules. As the wakfs are governed by the special law that is Muslim personal law and even the subsequent legislations in respect of wakf being United Provinces Muslim Wakf Act, 1936, the Wakf Act, 1954, the Uttar Pradesh Muslims Wakf Act, 1960 and the Wakf Act, 1995 recognizes the application of law of *Shar* and law of *Shar* does not recognize adverse possession in respect of creation of wakf, the plaintiffs cannot acquire title by adverse possession. Relevant paragraph 28 of the said judgment reads as follows:

"28. The learned counsel for the respondents relied heavily on Para 7-D of the 1956 Regulations and upon two decisions of the Orissa High Court rendered by reference thereto namely Laxmi Gouda and others v. Dandasi Goura (deceased by LR) and others, AIR 1992 Ori 5 and Madhia Nayak v. Arjuna Pradhan and others, (1988) 65 Cuttack LT 360. We have carefully perused both the decisions. The question which arose for decision therein was the effect of amendment made in Para

7-D of the Regulations and given a retrospective operation with effect from a back date. The High Court has held that if adverse possession extending over a period of 12 years had already stood perfected into acquisition of title before the date of the amendment, then the amended provision could not be read so as to extend the period of 12 years of acquisition of title by adverse possession substituted as 30 years even if such date fell after 2-10-1973, the date with which the amendment commenced operating. The question which is arising for decision before us namely whether a non-tribal can at all commence prescribing acquisition of title of adverse possession over the land belonging to a tribal situated in a tribal area was neither raised before the High Court nor decided by it. A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the Judges, and inferring from it a proposition of law which the Judges have not specifically laid down in the pronouncement. Still we make it clear that the provisions of Para 7-D of the Regulations are to be read in the light of the principle which we have laid down hereinabove. A tribal may acquire title by adverse possession over the immovable property of another tribal by reference to Para 7-D of the Regulations read with Art. 65 and S. 27 of the Limitation Act, 1963, but a non-tribal can neither prescribe nor acquire title by adverse possession over the property belonging to a tribal as the same is specifically prohibited by a special law promulgated by the State Legislature or the Governor in exercise of the power conferred in that regard by the Constitution of India. A general law cannot defeat the provisions of a special law to the extent to which they are in conflict; else an effort has to be made at reconciling the two provisions by homogenous reading.”

7. In AIR 1996 SC 112 (*Abubakar Abdul Inamdar & Ors. v. Harun Abdul Inamdar & Ors.*) the Hon'ble Apex Court has held that no amount of proof by inducting municipal registered entries can substitute pleading which are foundation of the claim of a litigating party. Applying the said principle of law, it is submitted that as ingredients of adverse possession have not been pleaded in plaint by inducting entries in revenue records plea of adverse possession cannot be substantiated by the plaintiffs and no inference of adverse possession can be drawn thereon. Relevant paragraph 5 of the said judgment reads as follows:

“5. With regard to the plea of adverse possession, the appellant having been successful in the two Courts below and not in the High Court, one has to turn to the pleadings of the appellant in his written statement. There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded a single overt act on the basis of which it could be inferred or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically of Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. The High Court caught the appellant right at that point and drawing inference from the evidence produced

on record, concluded that correct principles relating to the plea of adverse possession were not applied by the courts below. The finding, as it appears to us, was rightly reversed by the High Court requiring no interference at our end."

8. In AIR 1996 SC 869 (*Dr. Mahesh Chandra Sharma. v. Smt. Rajkumari Sharma & Ors.*) the Hon'ble Apex Court has held that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish adverse possession. As the plaintiffs, in the instant case, have not clearly plead and establish all the facts necessary to establish their adverse possession, the instant suit is liable to be dismissed. Relevant paragraph 36 of the said judgment reads as follows:

"36. In this connection, we may emphasise that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession. For all the above reasons, the plea of limitation put forward by the appellant, or by Defendants Nos. 2 to 5 as the case may, be is rejected."

9. In AIR 1987 SC 94 (*Hari Chand. v. Daulat Ram*) the Hon'ble Apex Court has held that if the encroachment was not one new and the structure was in existence prior to acquiring title over the property, the decree on the basis of adverse possession cannot be granted in favour of the plaintiff. Applying that principle of law, it is submitted that as in the present case it has been proved by adducing scriptures and gazetteers etc. by this defendant that there were vedi and temple at the site of Ramjanmasthan even prior to Babur's acquisition of sovereignty over Delhi, Agra and Oudh, the plaintiffs are not entitled for the reliefs as prayed for in the instant suit. Relevant paragraph Nos.10 and 11 of the said judgment read as follows:

"10. On a consideration of these evidence it is quite clear that the disputed kachha wall and the khaprail over it are not new construction, but existed for over 28 years and the defendant has been living therein as has been deposed to by Ramji Lal vendor of the plaintiff who admitted in his evidence that the land in dispute and the adjoining kachha walls had been affected by salt and the chhappar over the portion shown in red was tiled roof constructed about 28 year back. This is also supported by the evidence of the defendant, D.W. 1, that the wall in dispute was in existence when the partition was effected i.e. 28 years before. On a consideration of these evidences the Trial Court rightly held that the defendant had not trespassed over the land in question nor he had constructed a new wall or khaprail. The trial court also considered the report 57C by the court Amin and held that the wall in question was not a recent construction but it appeared 25-30 years old in its present condition as (is) evident from the said report. The suit was therefore dismissed. The lower appellate court merely considered the partition deed and map Exts. 3/1 and 3/2 respectively and held that the disputed property fell to the share of the plaintiffs vendor and the correctness of the partition map was not challenged in the written statement. The court of appeal below also referred to Amin's map 47A which showed

the encroached portion in red colour as falling within the share of plaintiffs vendor, and held that the defendant encroached on this portion of land marked in red colour, without at all considering the clear evidence of the defendant himself that the wall and the khaprail in question existed for the last 28 years and the defendant has been living there all along. P.W. 1 Ramji Lal himself also admitted that the wall existed for about 28 years as stated by the defendant and the kachha walls and the khaprail have been affected by salt. The lower appellate court though held that P.W. 1 Ramji Lal admitted in cross-examination that towards the north of the land in dispute was the khaprail covered room of Daulat Ram in which Daulat Ram lived, but this does not mean that the wall in dispute exists for the last any certain number of years, although it can be said that it is not a recent construction. Without considering the deposition of defendant No. 1 as well as the report of the Amin 57C the IIInd Addl. Civil Judge, Agra wrongly held that the defendant failed to prove that the wall in dispute and the khaprail existed for the last more than 12 years before the suit. The Civil Judge further held on surmises as "may be that the wall and khaprail have not been raised in May, 1961 as is the plaintiffs case, but they are recent constructions." This decision of the court of appeal below is wholly incorrect being contrary to the evidences on record.

11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuchha wall and khaprail over it are not recent constructions as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal P.W. 1 and Daulat Ram D.W. 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by metes and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-sharers by metes and bounds nor there is any averment that the suit property fell to the share of plaintiffs vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The plaintiff has singularly failed to prove his case as pleaded in the plaint."

10. In AIR 1947 PC 19 (*Smt. Bibhabati Devi. v. Rajmchandranarayan Roy & Ors.*) the Hon'ble Privy Council has held that possession must be adverse to a living person and if any lady was possessing under a mistake as to her husband's death, she could not claim that by her possession she was asserting a right adverse to one whom she regarded as dead. Applying that principle of law, it is submitted that as the deity is not a living person, adverse possession against deity can be claimed only through its sebaite and if any sebaite did not take any step for recovery of possession of the property of the deity then, limitation runs from the date of death of said sebaite so that new sebaite may

take step for recovery of the property of the deity. In the instant case, the plaintiffs have not pleaded the name of the sebaite during whose tenure of sebaiship they dispossessed the deity from the property as also they have not pleaded the date of death of the said sebaite for the purpose of counting the period of limitation and as such the instant suit is misconceived and liable to be dismissed. Relevant paragraph Nos.18 and 21 of the said judgment read as follows:

“18. Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of Ss.3 and 59, Evidence Act, 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of S. 60; but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of S. 114. As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but, in the opinion of their Lordships, the learned Judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorised by those in charge at Step Aside, having regard to “the common course of natural events, human conduct and public and private business”, and therefore to presume the existence of such authority. Having made such presumption, the fact of such an authorised request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails.

21. Finally, the appellant rests on Art. 144 and S. 28, Limitation Act, 1908. On the supposed death of the Second Kumar the appellant entered on her widow's estate in the undivided one-third share of the Bhowal estate, which belonged to her husband and she thereafter enjoyed it - after 1911, through the Court of Wards-for a period much exceeding the necessary twelve years and the question is whether her possession was adverse to her husband, he being in fact alive. Possession must be adverse to a living person, and, as she was possessing under a mistake as to his death, it is difficult to see how she can claim that by her possession she was asserting a right adverse to one whom she regarded as dead. The position of a widow as regards limitation is stated in 51 IA 17122 at p. 176, where Lord Dunedin, delivering the judgment, said,

22.(24)

11 AIR 1924 PC 121; 5 Lah 192; 51 IA 171; 80 IC 788 (PC), *Lajwanti v. Safa Chand*.

“It was then argued that the widows could only possess for themselves ; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiffs were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu, widow as often pointed out, is not a life renter but has a widow's estate-that is to say, a widow's estate in her deceased husband's estate. If possessing as a widow she possesses adversely to any one as

to certain parcels she does not acquire the parcels as stridhan, but she makes them good to her husband's estate "

Mr. Page, for the appellant, conceded that the appellant's possession could not be adverse to the reversioners, who would take as heirs of her husband, on the termination of her widow's estate. All that the appellant claimed to have prescribed was her interest in the estate as widow of the Second Kumar. It might well be argued that, according to the Hindu law, the wife is half of the husband, and that, on his death, she holds his estate as one-half of the husband, but their Lordships prefer to base their rejection of the appellant's contention on the broader ground that her possession was not adverse to a husband, whom she regarded as dead. Their Lordships cannot part with this case without expressing their deep indebtedness to counsel for their valuable assistance in a case of such unusual magnitude and complication, and, in particular, their gratitude and admiration for the untiring skill and breadth of mind with which Mr. Page has conducted his case. Their Lordships accordingly, are of opinion that the appeal fails and should be dismissed, and that the decision of the High Court should be affirmed, and they will so advise His Majesty. In the very special circumstances of this case, there will be no order as to costs of the appeal.

11. In AIR 1942 PC 47 (*Raja Rajgan Maharaja. Jagjit Singh v. Raja Pratap Bahadur Singh*) the Hon'ble Privy Council has held that under Section 23 of Oudh Land Revenue Act, 1876, the revenue officer had no power to determine questions of title and his duty was to determine the boundary on the basis of actual possession. It has also been held that it is for the plaintiffs to establish the title to the lands in suit held by the defendant's predecessor had been extinguished under Section 28 of the Limitation Act by the adverse possession of the plaintiff or their predecessor for appropriate statutory period of limitation, pleaded prior to the possession taken under attachment by the receiver appointed by the Magistrate. In the instant case, the plaintiffs have failed to establish their title to the land in suit in terms of the aforesaid judicial pronouncement of the Hon'ble Privy Council, the suit is liable to be dismissed. Relevant extracts from pages 48 and 49 of the said judgment reads as follows:

"It will be noted that the appellant's village Binjaha is not mentioned in either of these proceedings. The fourth stage is important as shewing the state of possession of the lands in suit at the date when the present suit was instituted on 26th January 1933. In the year 1931 there were two cases-Nos.39 and 41-under S. 145, Criminal PC, in the Court of the Magistrate of the First Class at Kheri, which involved the appellant and respondent in respect of the land now in dispute. In No. 39, on 4th May 1931, the Magistrate ordered the case to be filed as the parties had satisfied him that no breach of the peace need be apprehended. But Case No. 41 was commenced on a report by the Sub. Inspector of Police dated 14th October 1931, and on 24th October 1931, at the same time as he ordered the parties to attend the Court on 26th November, the Magistrate considering the case as one of emergency, ordered the plots referred to in the report to be attached

pending his decision under S. 145, and appointed the Tahsildar, Tahsil Nighasan, District Kheri, as receiver. These plots appear to have been the three small plots, a suit for possession of which by the present appellant had been finally dismissed by the Chief Court by decree dated 26th November 1929. These three plots amounting to 1.30 acre are included in the lands presently in suit. By two orders dated 7th November 1931, the Magistrate ordered the Tahsildar to take possession of the plots contained in a list attached to the first of these orders, and in addition to these plots, "if you find that there are any other plots in dispute, they should also be attached or taken possession of." It is common ground that the Tahsildar, acting under these orders, took possession of the lands presently in suit on 23rd February 1932, and that he was still in possession when the present suit was instituted on 26th January 1933. As the result of applications by the parties, who were agreed that, pending the decision of a civil Court, the lands should remain attached and that the proceedings should meantime be consigned to records, the lands to be released to the party who succeeded in the civil suit, the Magistrate made an order filing the case meantime dated 6th April 1932.

In the first place, their Lordships are clearly of opinion, contrary to the view of the Subordinate Judge, but in agreement with the view of the Chief Court, that it was for the appellant to establish that the title to the lands in suit held by the respondent's predecessor under the first settlement of 1865 had been extinguished under S. 28, Limitation Act, by the adverse possession of the appellant or his predecessors for the appropriate statutory period of limitation, completed prior to the possession taken under attachment on 23rd February 1932, by the Tahsildar, who thereafter held for the true owner. Their Lordships are further of opinion that the present suit, which was subsequently instituted, was rightly confined to a mere declaration of title, and was neither in form nor substance a suit for possession of immovable property.

In the second place, on the question of the errors of procedure of the Subordinate Judge in placing the burden of proving his possession within the limitation period on the respondent and ultimately refusing to allow the respondent to lead evidence in rebuttal of the appellant's evidence of adverse possession, it is enough to say that the appellant's counsel felt constrained to state that he could not defend the exclusion of evidence by the learned Judge, and that, if otherwise successful in his appeal, he should ask that the case should be remanded in order to give the respondent the opportunity which was so denied to him. The Chief Court held that the appellant had failed to prove adverse possession, and found it unnecessary to remand the case.

With regard to the statutory period of limitation, Art. 47 of the Act does not apply, as there has been no order for possession by the Magistrate under S. 145, Criminal P. C.: As the suit is one for a declaration of title, it seems clear that Arts. 142 and 144 do not apply, and their Lordships agree with the Chief Court that the suit is governed by Art. 120. This

leaves for consideration the main issue of proof of adverse possession by the appellant and his predecessors, and the appellant is at once faced by a difficulty which proved fatal to his success before the Chief Court, viz., that unless he can establish adverse possession of the lands in suit as a whole, he is unable, on the evidence, to establish such possession of identified portions of the lands in suit. Before their Lordships, the appellant's counsel conceded that, in order to succeed in the appeal, he must establish adverse possession of the lands in suit as a whole. He further conceded that his case on that point rested either (a) on the Habibullah decision of 1899, on which he succeeded before the Subordinate Judge, or (b) on the compromised proceedings under S. 145 in 1903. He conceded that neither the Habibullah decision nor the boundary proceedings in 1903 amounted to a judicial decision. The appellant maintained that the Habibullah decision, given under S. 23 of the Act of 1876, was good evidence of the state of possession at that time, and of the possession of the whole of the land in dispute by Kapurthala. He maintained that it must be assumed that Mr. Habibullah did his duty and that the decision was based on actual possession; under S. 35, Evidence Act, it was good evidence of the fact of possession. Unfortunately for this contention it appears on the face of the judgment that possession was only proved in respect of land under cultivation, and that the boundary line laid down by Mr. Habibullah was largely an arbitrary line, and, at least to that extent, was not based on actual possession by Kapurthala, and it is well established that adverse possession against an existing title g must be actual and cannot be constructive."

12. In AIR 1937 PC 69 (*Maharaja Sir Kesho Prasad Singh Bahadur. v. Bahuria Mt. Bhagjogna Kaur & Ors.*) the Hon'ble Privy Council has held that mere receipt of rent by persons claiming adversely is not sufficient to warrant finding of adverse possession. The possession of persons or their predecessors-in-title claiming by adverse possession must have "all the qualities of adequacy, continuity and exclusiveness" necessary to displace the title of the persons against whom they claim. As in the instant case neither the plaintiffs nor their predecessors-in-title had or have all the qualities of adequacy, continuity and exclusiveness, their suit based on adverse possession fails. Relevant extracts from page 78 of the said judgment reads as follows:

"the mere fact that many years after the sale the Gangbarar maliks or persons deriving title from them are obtaining rent for the land is in itself very significant. Even in a locality exposed to diluvion by the action of the river this circumstance alone might be given considerable weight. But without sufficient proof to cover the intervening years it was most reasonably held by the learned Subordinate Judge to be insufficient. The circumstance that the Maharaja was not in possession or in receipt of rent is, it need hardly be said, insufficient under Art. 144 to warrant a finding of adverse possession on behalf of the respondents or their predecessors-in-title. Their Lordships are of opinion that on the materials produced it cannot be contended that the learned Subordinate Judge was obliged in law to find that the possession of the principal respondents had "all the qualities of adequacy, continuity

and exclusiveness “ (per Lord Shaw 126 CWN 66610at p. 673) necessary to displace the title of the Maharaja, and they think that no reason in law exists why his finding of fact in this respect should not be final.”

13. In AIR 1933 PC 75 (*Ram Charan Das. v. Naurangi Lal*) the Hon'ble Privy Council has held that an allocation by the Mahant of a Mutt in respect of property belonging to the Mutt even if it is not for legal necessity or benefit if Mutt is good and effective assailing as the mahant continue to be such and hence adverse possession of the lessee as agasinst the Mutt commences only when the Mahant, who has leased the property ceased to be Mahant by death or otherwise and not from the date of allocation. Relevant extracts from page 78 of the said judgment reads as follows:

“This is a clear statement that a mahant is at liberty to dispose of the property of a mutt during the period of his life and that a grant purporting to be for a longer period is good to the extent of the mahant's life interest. Here again their Lordships think that the reference to life is upon the footing that the mahant continues during his life to hold that office. It will be observed that the statement is in no way confined to the grant of a lease, but covers the case of a purported out and out grant of the property. Whatever the intended duration of the attempted grant may be, it is good but good only for the limited period indicated. In view of these statements by the Board, their Lordships hold that in the present case the lease and the deed of sale of 13th February 1911 were good and effective so long as Rampat Das continued to be mahant and that therefore adverse possession only commenced when he died. The result is that the plaintiff's suit is not barred and the appeal succeeds. The decree of the High Court should be set aside with costs in that Court, and the decree of the Subordinate Judge restored. Their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of this appeal.”

14. In AIR 1931 PC 162 (*Bhupendra Narayan Sinha Bahadur. v. Rajeswar Prasad Bhakat*) the Hon'ble Privy Council has held that where a person without any colour of right wrongfully takes possession as a trespasser of the property of another in title which he may acquire by adverse possession will be strictly limited to what he had actually so possessed. As the schedule of the plaint does not contain a description of the property sufficient to identify it, in accordance with Order 7 Rule III of the Civil Procedure Code, and in view of admitted fact of possession of the Hindus at least in respect of Ramchabutra, a decree cannot be passed in their favour as prayed for. Relevant extracts from page 165 of the said judgment reads as follows:

“Where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed.”

15. In AIR 1940 PC 116 (*Mosque known as Masjid Shahid Ganj & Ors. v. Shiromoni Gurdwara Prabandhak Committee, Amritshwar & Anr.*) the Hon'ble Privy Council has held that the rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure,

the Limitation Act, 1908 applies to immovable made wakf. Relevant portion from page 121 of the said judgment reads as follows:

"The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Limitation Act of 1903 (Sic 1908) applies to immovables made wakf notwithstanding that the ownership in such property is said, in accordance with the doctrine of the two disciples, to be in God."

16. In AIR 1957 SC 314 (*P. Lakshmi Reddy. v. L. Lakshmi Reddy*) the Hon'ble Supreme Court has held that a receiver is an officer of Court and is not a particular agent of any party to the suit, notwithstanding that in law his possession is ultimately treated as a possession of the successful party on the termination of the suit. To treat such receiver as plaintiff's agent for the purpose of initiating adverse possession by the plaintiff, would be to impute wrong doing to the Court and its officers. The doctrine of receiver's possession being that of the successful party, cannot be pushed to the extent of enabling a person who was initially out of possession to claim the taking on of receiver's possession to his subsequent adverse possession. The commencement of adverse possession in favour of a person, implies that that person is in actual possession at the time, with a notorious hostile claim of exclusive title to repeal which, the true owner would be in a position to maintain an action. It would follow that whatever may be the animus intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with requisite animus. Relevant paragraph Nos.6 and 7 of the said judgment read as follows:

"6. The learned Attorney-General urges that prior possession of the Receiver pending the suit must be treated as possession on behalf of Hanimi Reddy with the animus of claiming sole and exclusive title disclosed in his plaint. In support of this contention he relies on the well-known legal principle that when a Court takes possession of properties through its Receiver, such Receiver's possession is that of all the parties to the action according to their titles. (See Kerr on Receivers (12th Edition) page 153). In Woodroffe on the Law relating to Receivers (4th Edition) at page 63 the legal position is stated as follows:

"The Receiver being the officer of the Court from which he derives his appointment, his possession is exclusively the possession of the Court, the property being regarded as in the custody of the law, in gremio legis, for the benefit of whoever may be ultimately determined to be entitled thereto".

But does this doctrine enable a person who was not previously in possession of the suit properties, to claim that the Receiver must be deemed to have taken possession adversely to the true owner, on this behalf, merely because he ultimately succeeds in getting a decree for possession against the defendant therein who was previously in possession without title? A Receiver is an officer of Court and is not a particular agent of any party to the suit, notwithstanding that in law his possession is ultimately treated as possession of the successful party on the termination of the suit. To treat such Receiver as plaintiffs

agent for the purpose of initiating adverse possession by the plaintiff would be to impute wrong-doing to the Court and its officers. The doctrine of the Receiver's possession being that of the successful party cannot, in our opinion, be pushed to the extent of enabling a person who was initially out of possession to claim the tacking on of Receiver's possession to his subsequent adverse possession. The position may conceivably be different where the defendant in the suit was previously in adverse possession against the real owner and the Receiver has taken possession from him and restores it back to him on the successful termination of the suit in his favour. In such a case the question that would arise would be different, viz., whether the interim possession of the Receiver would be a discontinuance or abandonment of possession or interruption of the adverse possession. We are not concerned with it in this case and express no opinion on it.

7. The matter may be looked at from another point of view. It is well-settled that limitation cannot begin to run against a person unless at the time that person is legally in a position to vindicate his title by action. In Mitra's Tagore Law Lectures on Limitation and Prescription (6th Edition) Vol. I, Lecture VI, at Page 159, quoting from Angell on Limitation, this principle is stated in the following terms :

"An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him(sic) who was in possession. (Angell, sections 390 and 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which constitutes adverse possession".

Consonant with this principle the commencement of adverse possession, in favour of a person, implies that that person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until *site animus*. In the leading case of *Agency Company v. Short*, (1888) 13 AC 793 (G) the Privy Council points out that there is discontinuance of adverse possession when possession has been abandoned and gives as the reason therefor, at page 798, as follows:

"There is no one against whom he (the rightful owner) can bring his action".

It is clearly implied therein that adverse possession cannot commence without actual possession which can furnish cause of action. This principle has been also explained in *Dwijendra Narain Roy v. Joges Chandra De*, AIR 1924 Cal 600 (H) at page 609 by Mookerjee, J. as follows:

"The substance of the matter is that time runs when the cause of action on accrues, and a cause of action accrues when there is in

existence a person who can sue and another who can be used The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. The statute (of limitation) does not attach to the claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result”.

In the present case, the co-heirs out of possession such as plaintiff and the second defendant were not obliged to bring a suit for possession, against Hanimi Reddy until such time as Hanimi Reddy obtained actual possession. Indeed during the time when the Receiver was in possession, obviously, they could not sue him for possession to vindicate their title. Nor were they obliged during that time to file a futile suit for possession either against Hanimi Reddy or against the defendants in Hanimi Reddy's suit when neither of them was in possession. It appears to us, therefore, that the adverse possession of Hanimi Reddy, if any, as against his co-heirs could not commence when the Receiver was in possession. It follows that assuming that the possession of Hanimi Reddy from January 20, 1930, was in fact adverse and amounted to ouster of the co-heirs such adverse possession was not adequate in time by October 23, 1941 the date of suit to displace the title of the plaintiff. It follows that the plaintiff- respondent before us, is entitled to the decree which he has obtained and that the decision of the High Court is, in our view, correct, though on different grounds. It may be mentioned that objection has been raised on behalf of the respondent before us that the question of tacking on Receiver's possession was not in issue in the lower courts and should not be allowed to be raised here. In the view we have taken it is unnecessary to deal with this objection.”

17. In AIR 2008 All 37 (*Ramzan & Ors. v. Smt. Hafooran & Ors.*) the Hon'ble Allahabad High Court has held that unless there is specific plea and proof that adverse possession has disclaimed his right and asserted title and possession to the knowledge of the true owner within the statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription. Where the adverse possessor were not sure as to who was the true owner and question of their being in hostile possession, then the question of denying title of true owner does not arise. Relevant paragraphs 27, 29 and 30 of the said judgment read as follows:

“27. It is, therefore, explicit that unless there is specific plea and proof that adverse possessor has disclaimed his right and asserted title and possession to the knowledge of the true owner within a statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription.

29. As pointed out above, where the defendants are not sure who is the true owner and question of their being in hostile possession then

the question of denying title of true owner does not arise. At the most, the defendants have claimed and which is found to be correct by the trial court that they have been in possession of the disputed property since the inception of the sale deeds in their favour. They came in possession, according to their showing, as owner of the property in question. It follows that they exercised their right over the disputed property as owner and exercise of such right, by no stretch of imagination, it can be said that they claimed their title adverse to the true owner.

30. Viewed as above, on the facts of the present case, the possession of the contesting defendants is not of the variety and degree which is required for adverse possession to materialise."

18. In AIR 1983 All 223 (*Prabhunarain Singh. v. Ramniranjan*) the Hon'ble Allahabad High Court has held that a person claiming title to land by adverse possession, he must specifically plead area of land and period of possession of land. As in the instant case neither the area of land has been specifically pleaded nor the period of possession has been specifically pleaded, the suit is liable to be dismissed. Relevant paragraph 6 of the said judgment reads as follows:

"6. With regard to the dispute raised by the defendants about the plaintiff's title to the land, the defendants did not set up any independent title themselves. They based their right in adverse possession. A person claiming title to any land by adverse possession has to be very specific about the area of the land and the period over which he has been in possession. The eastern boundary of the land purchased by the plaintiff was specific. Much reliance could not be placed on the area specified in the sale-deed, inasmuch as the western boundary was shown to be the field of the vendor. Even if the plaintiff had some extra land under his possession, it is not known whether he had increased the area of his occupation westwards or eastwards. So far as the defendants were concerned, it was sufficient that the eastern boundary of the land purchased by the plaintiff was specified to be their house. The defendants could, at the most, claim some piece of land around their house for purpose of approach or cleaning the drains etc. But that is not to say that they could allow the Nabdan from their house to flow on into the plaintiff's Sehan and create nuisance. The defendants should have maintained the cesspool and prevented the outflow of the dirty water from the cesspool to the plaintiff's Sehan by constructing a proper drain."

19. In AIR 1978 All 555 (*Smt. Bitola Kuer. v. Sri Ram Charan*) the Hon'ble Allahabad High Court has held that possession follows title and the corollary from this principle is that the burdens lies on the person who claims to have acquired title by adverse possession to prove his case. As the plaintiffs have pleaded adverse possession, the burden lies upon them to prove their case which they have miserably failed to do. And, as such the suit is liable to be dismissed. Relevant paragraph 16 of the said judgment reads as follows:

"16. It is well settled that title ordinarily carries with it the presumption of possession and that when the question arises is to who was in

possession of land, the presumption is that the true owner was in such possession. In other word" possession follows title. The inevitable corollary from this principle is that the burden lies on the person who claims to have acquired title by adverse possession to prove his case. As early as the case of *Radhamoni Debi v. Collector of Khulna* (1900) ILR 27 Cal 943 (PC); Lord Robertson expressed the principle in the following words :

" It is necessary to remember that the onus is on the appellant and that what she has to make out is possession adverse to the competitor But the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to that competitor;"

20. In AIR 1970 All 289 (*Qadir Bux v. Ramchand*) the Hon'ble Allahabad High Court has held that the term "dispossession" applies when a person comes in and drives out others from the possession. It implies ouster; a driven out of possession against the will of the person in actual possession. The term "discontinuance" implies a voluntary act and openness of possession followed by the actual possession of another. It implies that a person discontinuing as owner of the land and left at to be dispossessed by any one who has not to come in. As it has been admitted by the plaintiffs in their written statement filed in O.S.No.1 of 1989 that last namaj was offered on 16th December, 1949 and thereafter they discontinued offering prayer in the alleged mosque and plaintiffs or the persons under or through whom they are claiming had also admitted in their affidavit filed in the proceeding under Section 145 of Cr.P.C. that their intention was to discontinue offering the prayers in the alleged mosque so that it can be occupied by the Hindus as their place of worship. As the Hindus were already performing their worships the effect of discontinuing made their possession peaceful and uninterrupted. As such the instant suit which was filed on 18th December 1949 is also barred by limitations. Relevant paragraph 130 of the said judgment reads as follows:

"30. The main point for consideration is whether in such circumstances it can be said that the plaintiff had been dispossessed or had discontinued his possession within the meaning of Article 142 of the First Schedule to the Indian Limitation Act. The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster: a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession, but this cannot be assumed. It must be either admitted or proved.

So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons

possession either voluntarily or by vis major for howsoever short a time before he has actually perfected his title by twelve years' adverse possession the possession of the true owner is deemed to have revived and he gets a fresh starting point of limitation - vide *Gurbinder Singh v. Lal Singh*, AIR 1965 S.C. 1553. Wrongful possession cannot be assumed against the true owner when according to the facts disclosed by him he himself had voluntarily handed over possession and was not deprived of it by the other side."

21. In AIR 1965 SC 364 (*Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*) the Hon'ble Supreme Court held that statement of a party in letters written by the said party can be used against the said party as the said party's admission but cannot be used in favour of such party accepting them to be correct statements. Relying on the said judgment it is humbly submitted that the statements made by the Mutwalli, Muezzins, Khattibs, some of the plaintiffs are to be used against them as their admissions accepting them to be correct statements. As from the statements of the above mentioned proceedings it appears that even after 1856 the Hindus were performing worship inside the central hall of the alleged Babri Mosque and also they accept that this practice was continued for several decades and ultimately in 1934 the disputed structure was demolished by the Hindus and when it was re-erected the Muslims did not go to offer prayer due to panic as in 1934 riots at least three Muslims had been killed are the admission of the plaintiffs or the persons through or under whom they are claiming. On the basis of whereof it can be inferred that the Hindus were all along asserting their customary rights and performing their customary rituals of worshipping the birthplace of the Lord of Universe Sri Rama in disputed structure and the Muslims were never in peaceful, uninterrupted possession of the alleged Babri Mosque. As such the instant suit is liable to be dismissed. Relevant paragraph 96 of the said judgment reads as follows:

"96. The respondent stated in the examination-in-chief that when she went to Prantil from Bombay which was about the 4th of June 1947 she had swelling on her feet, hands and face. I cross-examination she further stated that she had swelling over these parts and also high blood-pressure in June and that the passing of albumin and swelling of hands and feet continued till delivery but there was no high blood-pressure at the time of delivery. The Court below did not act on the statement of the respondent about her having the symptoms of toxemia in the month of June as none of the letters on record written in June makes reference to such a written in June makes reference to such a condition of hers. This is true, but that does not accessarily mean that she did not have such symptoms in the month of June. They might not have been very servere that month and the severity appeared in the month of July. Letters on record amply make out that she was suffering from a servere type of toxemia in July. It has been urged for the respondent in connection with her alleged toxemic condition in the month of June 28 about statement in her letter dated June 28 about her walking 2 miles a day is not compatible with her statement in Court and the suggestion for the petitioner that she was suffering from toxemia in the month of June. The statements of the respondent in her

letters can be used against her as her admissions, but cannot be used in her favour accepting them to be correct statements. If she was pregnant at the time of marriage she must take such steps up to the time of delivery as to allay the suspicion that she had been really pregnant at the time of marriage. She may therefore be inclined to make wrong statements in her letters to prepare for any plausible explanation when the delivery took place before the expected time on the basis of her conception after marriage. There is therefore no reason not to believe her statement that she did have such trouble of milder kind in the month of June. Severe trouble does not usually come at once. It develops from a mild stage."

22. In AIR 1996 SC 941 (*Raj Kumar v. M/s. Chiranjilal Ram Chand, Ludhiana & Ors.*) the Hon'ble Supreme Court held that in respect of joint properties admission by one of the co-owners that the other co-owners had 1/3rd share in the said properties is a admission which can be relied upon under Section 18 of the Evidence Act, 1872. Relevant paragraph 8 of the said judgment reads as follows:

"8. In view of the discussion of various items by the High Court and the conclusion reached on the basis thereof, we entirely agree with the High Court that the admissions bind the appellants. Therefore, it is clearly established from the admission that the insolvent Chiranji Lal had 1/3 share in these properties. Consequently, they stood vested in the Official Receiver and he is entitled to proceed further in realising the amounts to distribute to the creditors."

23. In AIR 1965 SC 1553 (*Gurbinder Singh & Anr. v. Lal Singh & Anr.*) the Hon'ble Supreme Court held that in order that Article 142 is attracted the plaintiff must initially found in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It has also been held that in a suit to which Article 144 attracted the burden is on the party who claims adverse possession to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of an independent trespasser. As it is Plaintiffs' admitted fact that the plaintiffs discontinued their possession at least on 16th December, 1949, they have failed to prove that they were in possession for 12 years before the date of filing of the instant suit i.e. 18th December, 1961. As such the suit is barred by Article 142 of the Limitation Act, 1908. As on the other hand the plaintiffs also claim adverse possession of the disputed structure, burden of proof lies upon them and as they have failed to prove their adverse possession for 12 years before the date of filing of the suit, i.e. 18th December, 1961, the suit is also barred by Article 144 of the Limitation Act. Relevant paragraph nos.6, 8 and 10 of the said judgment read as follows:

"6. In order that Art. 142 is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It is no

one's case that Lal Singh ever was in possession of the property. It is true that Pratap Singh was in possession of part of the property - which particular part we do not know — by reason of a transfer thereof in his favour by Bakshi Singh. In the present suit both Lal Singh and Pratap Singh assert their claim to property by succession in accordance with the rules contained in the dastur ul amal whereas the possession of Pratap Singh for some time was under a different title, altogether. So far as the present suit is concerned it must, therefore, be said that the plaintiffs-respondents were never in possession as heirs of Raj Kaur and consequently Art. 142 would not be attracted to their suit.

8. Mr. Tarachand Brijmohanlal, however, advanced an interesting argument to the effect that if persons entitled to immediate possession of land are somehow kept out of possession - may be by different trespassers- for a period of 12 years or over, their suit will be barred by time. He points out that as from the death of Raj Kaur her daughters, through one of whom the respondents claim, were kept out of possession by trespassers and that from the date of Raj Kaur's death right up to the date of the respondents' suit, that is, for period of nearly 20 years trespassers were in possession of Mahan Kaur's, and after her death, the respondents' share in the land, their suit must, therefore, be regarded as barred by time. In other words, the learned counsel wants to tack on the adverse possession of Bakshi Singh and Pratap Singh to the adverse possession of the Raja and those who claim through him. In support of the contention reliance is placed by learned counsel on the decision in *Ramayya v. Kotamma*, ILR 45 Mad 370: (AIR 1922 Mad 59). In order to appreciate what was decided in that case a brief resume of the facts of that case is necessary. Mallabattudu, the last male holder of the properties to which the suit related, died in the year 1889 leaving two daughters Ramamma and Govindamma. The former died in 1914. The latter surrendered her estate to her two sons. The plaintiff who was a transferee from the sons of Govindamma instituted a suit for recovery of possession of Mallabattudu's property against Punnayya, the son of Ramamma to whom Mallabattudu had made an oral gift of his properties two years before his death. Punnayya was minor at the date of gift and his elder brother Subbarayudu was managing the property on his behalf. Punnayya, however, died in 1894 while still a minor and thereafter his brothers Subbarayudu and two others were in possession of the property. It would seem that the other brothers died and Subbarayudu was the last surviving member of Punnayya's family. Upon Subbarayudu's death the properties were sold by his daughters to the third defendant. The plaintiff-appellants suit failed on the ground of limitations. It was argued on his behalf in the second appeal before the High Court that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that as Subbarayudu continued in possession Subbarayudu's possession was also that of a trespasser, that as neither Subbarayudu nor Punnayya completed possession for 12 years they could not tack on one to the other and that the plaintiff claiming through the nearest

reversioner is not barred. The contention for the respondents was that there was no break in possession so as to re-vest the properties in the original owners, that Punnayya and Subbarayudu cannot be treated as successive trespassers and that in any event the real owner having been out of possession for over 12 years the suit was barred by limitation. The High Court following the decision of Mookerjee, J. in *Mohendra Nath v. Mt. Shamsunnessa*, 21 Cal LJ 157 at p. 164 : (AIR 1915 Cal 629 at p. 633), held that time begins to run against the last full owner if he himself was dispossessed and the operation of the law of limitation would not be arrested by the fact that on his death he was succeeded by his widow, daughter or mother, as the cause of action cannot be prolonged by the mere transfer of title. It may be mentioned that as Mallabattudu had given up possession to Punnayya under an invalid gift Art. 142 of the Limitation Act was clearly attracted. The sons of Govindamma from whom the appellant had purchased the suit properties claimed through Mallabattudu and since time began to run against him from 1887 when he discontinued possession it did not cease to run by the mere fact of his death. In a suit to which that article applies the plaintiff has to prove his possession within 12 years of his suit. Therefore, so long as the total period of the plaintiff's exclusion from possession is, at the date of the plaintiff's suit, for a period of 12 years or over, the fact that this exclusion was by different trespassers will not help the plaintiff provided there was a continuity in the period of exclusion. That decision is not applicable to the facts of the case before us. This is a suit to which Art. 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims - but not the adverse possession of independent trespassers.

10. This view has not been departed from in any case. At any rate none was brought to our notice where it has not been followed. Apart from that what we are concerned with is the language used by the legislature in the third column of Art. 144. The starting point of limitation there stated is the date when the possession of the defendant becomes adverse to the plaintiff. The word "defendant" is defined thus in S. 2 (4) of the Limitation Act thus :

'defendant' includes any person from or through whom a defendant derives his liability to be sued"

No doubt, this is an inclusive definition but the gist of it is the existence of a jural relationship between different persons. There can be no jural relationship between two independent trespassers. Therefore, where a defendant in possession of property is sued by a person who has title to it but is out of possession what he has to show in defence is that he or anyone through whom he claims has been in possession for more than the statutory period. An independent trespasser not being such a person the defendant is not entitled to tack on the previous possession of that person to his own possession. In our opinion,

therefore, the respondents' suit is within time and has been rightly decreed by the Courts below. We dismiss this appeal with costs."

24. In AIR 1954 SUPREME COURT 355 "Nathoo Lal v. Durga Prasad" the Hon'ble Supreme Court held that what is admitted by a party to be true must be presumed to be true unless the contrary is shown. Relying on said Judgment it is submitted that the ante litem motam statements of the plaintiffs made in their written statements in the suits which are also analogously being tried to the effect that the Muslims discontinued using the Disputed structure on or after 16.12.1949; their post litem motam statements made in the plaint of the instant suit that prayer was offered till 23.12.1949 can not be taken in to account which is very much false apparent from records as relevant records says that the said Disputed Structure was occupied by some Hindu group in the night of 22/23.12.1949 when alleged Mosque was under lock and key. There is no evidence to the contrary in the case, as such it is admitted fact of the plaintiffs that they discontinued their possession on 16.12.1949 and didn't use it as Mosque from 17.12.1949 as such in view of this fact also instant suit is barred by limitation even under Article 142 or 144 of the Indian Limitation Act, 1908 though those Articles are not applicable but Article 120 of the said Act is applicable. Relevant paragraph 14 of the said judgment reads as follows:

"14. In our judgment, there is force in the contention of Dr. Tek Chand and none of the contentions raised by the respondent's counsel have any validity. That Ramachandra bequeathed the suit property and did not gift it to his daughter Laxmi is a fact which cannot be questioned at this stage. It was admitted by the plaintiff himself in the witness box.

This is what he said:

"Ramachandra had made a will in favour of Mst. Laxmi and in that connection my maternal grand-mother and maternal great grand-mother got the gift deed registered. This very gift deed was got executed by my maternal grandmother and maternal great grandmother and had got it registered. Through this gift deed Mst. Laxmi held possession over it, till she was alive. She had kept deponent as her son and so she got the rent notes executed in my name."

What is admitted by a party to be true must be presumed to be true unless the contrary is shown. There is no evidence to the contrary in the case. The gift deed fully supports the testimony of the plaintiff on this point. It definitely states that according to the will, the gift deed was executed in favour of Laxmi and it further recites that Laxmi was entitled to deal with the house in any manner she liked. Those who were, directed to execute the oral will made by Ramachandra must be presumed to have carried out his directions in accordance with his wishes.

It seems clear that the intention of the testator was to benefit his daughter Laxmi and to confer upon her the same title as he himself possessed. She was the sole object of his bounty and on the attendant circumstances of this case it is plain that he intended to confer on her

whatever title he himself had. Laxmi therefore became the absolute owner of the property under the terms of the oral will of her father and the plaintiff is no heir to the property which under the law devolved on Laxmi's husband who had full right to alienate it."

25. In *Draupadi Devi v. Union of India*, (2004) 11 SCC 425 the Hon'ble Supreme Court held that the plaintiff was bound to plead in the plaint when the cause of action arose. If he did not, then irrespective of what the defendants may plead in the written statement, the court would be bound by the mandate of Section 3 of the Limitation Act, 1908 to dismiss the suit, if after ascertaining the facts by evidence it is found that on the plaintiff's own pleading his suit is barred by limitation. However, when the facts were ascertained by evidence Relying on said judgment it is submitted that on ascertained facts by evidence cause of action for instant Suit arose on 29.12.1949 i.e. the day of Order of attachment passed in the proceeding under section 145 of the Cr. P.C. 1898 which fact brings the instant suit within ambit of Article 120 of the Indian Limitation act, 1908; it is liable to be dismissed under Section 3 of the said Act of 1908. Relevant paragraph 73 to 75 of the said judgment read as follows:

“ 73. We may notice here that under the Code of Civil Procedure, Order 7 Rule 1(e) requires a plaint to state “the facts constituting the cause of action and when it arose”. The plaintiff was bound to plead in the plaint when the cause of action arose. If he did not, then irrespective of what the defendants may plead in the written statement, the court would be bound by the mandate of Section 3 of the Limitation Act, 1908 to dismiss the suit, if it found that on the plaintiff's own pleading his suit is barred by limitation. In the instant case, the plaint does not plead clearly as to when the cause of action arose. In the absence of such pleadings, the defendants pleaded nothing on the issue. However, when the facts were ascertained by evidence, it was clear that the decision of the Government of India not to recognise the suit property as private property of the Maharaja was taken sometime in the year 1951, whether in March or May. Dewan Jarmani Dass, the plaintiff and the Maharaja were very much aware of this decision. Yet, the suit was filed only on 11-5-1960.

74. The Division Bench was, therefore, right in applying Article 120 of the Limitation Act, 1908 under which the period of limitation for a suit for which no specific period is provided in the Schedule was six years from the date when the right to sue accrues. The suit was, therefore, clearly barred by limitation and by virtue of Section 3 of the Limitation Act, 1908, the Court was mandated to dismiss it.


75. As rightly pointed out by the Division Bench, the learned Single Judge ought to have permitted the plea to be raised on the basis of the facts which came to light. The Division Bench has correctly appreciated the plea of limitation, in the facts and circumstances of the case, and rightly come to the conclusion that the suit of the plaintiff was liable to be dismissed on the ground of limitation. We agree with the conclusion of the Division Bench on this issue.

PART XXXI

THE PLAINTIFFS CAN NOT BE ALLOWED TO APPROBATE AND REPROBATE ON ONE HAND THEY ARE SEEKING DECLARATION BASED ON TITLE WHILE ON OTHER HAND THEY ARE CLAIMING RELIEF BASED ON ADVERSE POSSESSION CONTRARY TO TITLE AS SUCH THE SUIT IS LIABLE TO BE DISMISSED:

1. In (2006) 2 SCC 641 National Insurance Co. Ltd. V. Mastan the Hon'ble Supreme Court held that the election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims he cannot be allowed to enjoy both. The Doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate inheres in it. Relying on said judgment it is submitted that the plaintiffs cannot be allowed to press two inconsistent pleas; on one hand claiming possession based on the title under or through Emperor Babur while on other hand claiming possessory title based on adverse possession as such the instant suit is liable to be dismissed. Relevant paragraph 23-29 from the said judgment read as follows:

23. The "doctrine of election" is a branch of "rule of estoppel", in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

 **649 24.** In *Nagubai Ammal v. B. Shama Rao*⁵ it was stated: (SCR p. 470)

"It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."

25. In *C. Beepathumma v. Velasari Shankaranarayana Kadambolihaya*⁶ it was stated: (SCR p. 850)

"The doctrine of election which has been applied in this case is well settled and may be stated in the classic words of Maitland—

That he who accepts a benefit under a deed or Will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.'

(See *Maitland's Lectures on Equity*, Lecture 18.)

The same principle is stated in *White and Tudor's Leading Cases in Equity*, Vol. (sic) 18th Edn. at p. 444 as follows:

'Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.... That he who accepts a

benefit under a deed or Will must adopt the whole contents of the instrument.’ “

(See also *Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti*⁷.)

26. Thomas, J. in *P.R. Deshpande v. Maruti Balaram Haibatti*⁸ stated the law thus: (SCC p. 511, para 8)

“8. The doctrine of election is based on the rule of estoppel — the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.”

(See also *Devasahayam v. P. Savithramma*⁹.)

27. The first respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof.

28. We, therefore, with respect do not subscribe to the views of the Full Bench of the Karnataka High Court.

29. Mr P.R. Ramasesh is not correct in contending that both the Acts should be read together. A party suffering an injury or the dependent of the deceased who has died in the course of an accident arising out of use of a motor vehicle may have claims under different statutes. But when the cause of action arises under different statutes and the claimant elects the forum under one Act in preference to the other, he cannot thereafter be permitted to raise a contention which is available to him only in the former.

2. In (1992) 4 SCC 683 *R.N. Gosain v. Yashpal Dhir* the Hon'ble Supreme Court held that law does not permit a person to both approbate and reprobate, which principle is based on the doctrine of election which postulates that no party can say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. Relying on said judgment it is most respectfully submitted that having obtained benefit of the alleged waqf by stating that the Emperor Babur acquired title of the land in question by defeating the then ruler of Ayodhya and thereafter erected the alleged Mosque and created graveyards for the dead soldiers; now when the Babur's title is found void the plaintiffs cannot claim benefit on the ground of adverse possession as both are inconsistent to each other as such the instant suit is liable to be dismissed on this score alone. Relevant paragraph 10 of the said judgment reads as follows:

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person ¹⁰ cannot say at one time that a transaction is valid and

thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See : *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*⁴, Scrutton, L.J.] According to *Halsbury's Laws of England*, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)

3. In AIR 1956 SC 593 *Nagubai Ammal and others v. B.Shama Rao and others* the Hon'ble Supreme Court held that a party who in earlier litigation had obtained decree on certain plea cannot be permitted to change his front in subsequent litigation. Relying on said judgment it is submitted that in *Masmula Misl. Mukadama no. 61/280 of 1885 Mahant Raghubar Das v. Sarkar Bahadur Kaser-E-Hind and Mohammad Asghar* and Civil appeal no. 27 of 1886 as well as in regular suit no. 29 of 1945 *Shia Central Board of Waqf U.P. v. Sunni Central Board of Waqf* the plaintiffs or their predecessors have obtained benefit from the respective courts on the basis of the plea that Emperor Babur was the owner of the disputed site and he had erected an alleged mosque thereon; now they are estopped from making plea of adverse possession ; as such the instant suit is liable to be dismissed on this ground alone. Relevant paragraph 21 of the said judgment reads as follows:

"21. We shall now deal with the contention of the appellants that in view of what happened in O. S. No. 92 of 1938-39 it is not open to the plaintiff to plead in these proceedings that the decree and sale in O. S. No. 100 of 1919-20 are not collusive.

It is argued that in his plaint in O. S. No. 92 of 1938-39 the plaintiff alleged that the proceedings in O. S. No. 100 of 1919-20 were collusive, adduced evidence in proof of these allegations, persuaded the court to give a finding to that effect, and obtained a decree on the basis of that finding, and he cannot therefore be permitted in this litigation to change his front and plead that the proceedings in O. S. No. 100 of 1919-20 are not collusive and succeed on it. This bar arises, it is argued, on the principle that a person cannot both approbate and reprobate."

4. In AIR 1965 SC 241 *C. Beepathuma and others v. Velasari Shankarnarayana Kadambolithaya* the Hon'ble Supreme Court held that the Doctrine of election is that, he who accepts a benefit under a deed or will or other instrument must adopt whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it. This principle is often put in another form that a person cannot approbate and reprobate the same transaction. Relying on said judgment it is submitted that the plaintiffs cannot be allowed to harp on applicability of Article 142 of the Indian Limitation Act, 1908 on one hand and of Article 144 on other hand. Relevant paragraph 17 and 18 of the said judgment read as follows:

"17. The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland-

"That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."

(See Maitland's lectures on Equity Lecture 18)

The same principle is stated in White and Tudor's Leading cases in Equity Vol, 1 8th Edn, at n. 444 as follows:

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one, that he should not enjoy both That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

18. The Indian courts have applied this doctrine in several cases and a reference to all of them is hardly necessary. We may, however, refer to a decision of the Madras High Court in Ramakottayya v. Viraraghavayya, ILR 52 Mad 556: (AIR 1929 Mad 502 FB) where after referring to the passage quoted by us from White and Tudor, courts Trotter, G. J. observed that the principle is often put in another form that a person cannot approbate and reprobate the same transaction and he referred to the decision of the Judicial committee in Rangaswami Gounden v. Nachiappa Gounden, ILR 42) Mad 523: (AIR 1918 PC 196). Recently, this court has also considered the doctrine in Bhau Ram v. Baij Nath Singh, AIR 1961 SC 1327."

PART - XXXII

BURDEN OF PROOF UNDER SECTION 101,102,103 AND 110 OF THE INDIAN EVIDENCE ACT,1872 LIES ON THE PLAINTIFFS WHICH THEY HAVE FAILED TO PROVE AS SUCH THE INSTANT SUIT IS LIABLE TO BE DISMISSED:

1. In AIR 2007 SC 2191 (*M/s. Kamakshi Builders. v. M/s. Anbedkar Educational Society & Ors.*) the Hon'ble Apex Court has held that in case of claim for possession based on title, there is no prima facie animus possidendi as the claim for title by prescription is not tenable. Presumption by itself would not discharge the burden of proof on claimant and would not create title. Acquisition of title is inference of law arising out of certain sets of facts as such a person not acquiring title in law cannot be vested only by reason of acquiescence or estoppel on part of other. Relying on the said ratio of law, it is submitted that as the plaintiffs have claimed the possession based on title there is no prima facie animus possidendi their claim for title by prescription is not tenable and the suit is liable to be dismissed. Relevant paragraph nos.24, 26, 28 and 29 of the said judgment read as follows:

“24. Acquiescence on the part of Respondent No. 3, as has been noticed by the High Court, did not confer any title on Respondent No. 1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.

26. Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other.

28. It may be true that Respondent No. 3 herein should have examined himself and the learned Trial Judge committed a serious error in drawing an adverse inference in that behalf as against Respondent No. 1. It was, however, so done keeping in view the fact that Respondent No. 3 was evidently not interested in the property in view of the fact that it had suffered a decree. For all intent and purport, even if the submission of Mr. Parasaran is accepted that the appellant is 1999 AIR SCW 1129 claiming only by reason of an award, he has transferred the property in his favour. He received a valuable consideration in terms of the award. We are not concerned with the validity thereof. Non-examination of Respondent No. 3 indisputably would give rise to a presumption, as has been held by this Court in *Sardar Gurbaksh Singh v. Gurdial Singh* [AIR 1927 PC 230]; *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh* [AIR 1931 Bombay 97]; and *The Ramanathapuram Market Committee, Virudhunagar v. East India Corpn. Ltd., Madurai* [AIR 1976 Madras 323] and *Vidhyadhar v. Manikrao and Anr.* [(1999) 3 SCC 573], but by reason of presumption alone, the burden is not discharged. A title is not created

29. A claim of title by prescription by Respondent No. 1 again is not tenable. It based its claim on a title. It had, therefore, prima facie, no animus possidendi.”

2. In (1997) 7 SCC 567 D.N. Venkata Rayappa v. State of Karnataka & Ors. the Hon'ble Supreme Court has held that in view of the prohibition in respect of alienation, alienee derives no valid title. It has also been held that in claim of adverse possession, the plaintiffs are required to plead and prove that they disclaimed the title under which they came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the owner allowed them without any law or hindrance to remain in possession and enjoyment of the property adverse to his interest until the expiry of the prescribed period. Relying on the said principle of law, it is submitted that as according to Muslim Personal Law building a mosque on the land of others is prohibited, the plaintiffs or their predecessors derive no valid title. The plaintiffs have also not pleaded and proved that they disclaimed the tile under which they came into possession. They have also failed to set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of true owners as they themselves have not mentioned the true owner as such the plea of adverse possession have not been proved and the suit is liable to be dismissed. Relevant paragraph 3 of the said judgment reads as follows:

3. The petitioners, admittedly, had purchased the property in the years 1962-63 and 1963-64 from the original allottees. The Government have allotted those lands as per Saguvali Chit containing prohibition of alienation of the land. Subsequently, the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 was enacted totally prohibiting the alienation up to a particular period. The proceedings were initiated against the petitioners for ejectment under the said Act. All the authorities have concurrently held that the alienation in favour of the petitioners was in violation of the above Rules and the said Act and hence the sales are voidable. When the case had come up before this Court, this Court while upholding the constitutionality of the Act directed the authorities to go into the question of adverse possession raised by the petitioners. The learned Single Judge has extracted the pleadings on adverse possession of the petitioners. Therein, the High Court had pointed out that there is no express plea of adverse possession except stating that after the purchase of the lands made by them, they remained in possession and enjoyment of the lands. What requires to be pleaded and proved is that the purchaser disclaimed his title under which he came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the latter allowed the former, without any let or hindrance, to remain in possession and enjoyment of the property adverse to the interest of the true owner until the expiry of the prescribed period. The classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario*. After considering the entire case-law in that behalf, the learned Single Judge has held thus:-

"The contention raised by the petitioners that they have perfected their title in respect of the lands in question by adverse possession, has to fail on two counts. Firstly, the crucial facts, which constitute adverse possession have not been pleaded. The pleadings extracted above, in

my ⁵⁶⁹ view, will not constitute the crucial facts necessary to claim title by adverse possession. It is not stated by the petitioners in their pleadings that the petitioners at any point of time claimed or asserted their title, hostile or adverse to the title of the original grantees/their vendors. In my view, mere uninterrupted and continuous possession without the animus to continue in possession hostile to the rights of the real owner will not constitute adverse possession in law.

In the case of *Lakshmi Reddy*¹ relied upon by Shri Narayana Rao at para 7 of the judgment, the Supreme Court, following the decision of the Privy Council in *Secy. of State v. Debendra Lal Khan*², has observed that the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario* and the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

In the case of *State of W.B. v. Dalhousie Institute Society*³ the Supreme Court, on the basis of the materials on record, which were referred to by the High Court, took the view that in the said case, the respondent had established his title to the site in question by adverse possession. Further, the said decision proceeds on the basis that the grant made by the Government was invalid in law. That is not the position in the present case. The alienation in question was only voidable. The petitioners came into possession of the lands in question by virtue of the sale deeds which are only voidable in law. Therefore, they have come into possession by virtue of the derivative title as observed by the Supreme Court in the case of *Chandevappa*⁴. Further, in the case of *Kshitish Chandra*⁵, the observation made by the Supreme Court at para 8 of the judgment relied upon by Shri Narayana Rao in support of his contention that the only requirement of law to claim title by adverse possession is that the possession must be open and without any attempt at concealment and it is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner concerned, I am of the view that the said observation must be understood with reference to the observations made in para 7 of the judgment. At para 7 of the judgment, the Supreme Court has observed thus:

'7. ... For instance, one of the most important facts which clearly proved adverse possession was that the plaintiff had let out the land for cultivatory purposes and used it himself from time to time without any protest from the defendant. During the period of 45 years, no serious attempt was made by the municipality to evict the ⁵⁷⁰ plaintiff knowing full well that he was asserting hostile title against the municipality in respect of the land.'

Further, this Court, in the case of *Danappa Revappa Kolli v. Gurupadappa Kallappa Pattana Shetti*⁶, while referring to the decision of the Supreme Court in *Kshitish Chandra case*⁵, relied upon by Shri Narayana Rao in support of the plea of adverse possession, has observed that apart from the actual and continuous possession which are among other ingredients of adverse possession, there should be necessary

animus on the part of the person who intends to perfect his title by adverse possession. The observations made in the said decision reads thus:

'5. ... Apart from actual and continuous possession which are among other ingredients of adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession. A person who under the bona fide belief thinks that the property belongs to him and as such he has been in possession, such possession cannot at all be adverse possession because it lacks necessary animus for perfecting title by adverse possession.'

Therefore, it is clear that one of the important ingredients to claim adverse possession is that the person who claims adverse possession must have set up title hostile to the title of the true owner. Therefore, I am of the view that none of the decisions relied upon by Shri Narayana Rao in support of the plea of adverse possession set up by the petitioners, is of any assistance to the petitioners.

Further, admittedly, there is not even a whisper in the evidence of the first petitioner with regard to the claim of adverse possession set up by the petitioners. It is not stated by the petitioners that they have been in continuous and uninterrupted possession of the lands in question. What is stated by the petitioners, in substance, is that they came into possession of the lands in question by virtue of the sale deeds executed by the original grantees. The Supreme Court, in para 11 of the decision in *Chandevappa case*⁴, has observed thus:

'11. The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly, the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant.'

Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession and, therefore, the Act does not apply as laid down by the Supreme Court in *Manchegowda case*⁷. The law laid down by the Supreme Court in

*Chandavarappa case*⁴ fully applies to the facts of the present case. In the said case, while considering the claim of adverse possession of the purchaser of a granted land from the original grantee, the Supreme Court has observed that the person who comes into possession under colour of title from the original grantee, if he intends to claim adverse possession as against the State, must disclaim his title and plead his hostile claim to the knowledge of the State and the State had not taken any action thereon within the prescribed period. It is also relevant to point out that sub-section (3) of Section 5 of the Act provides that where a granted land is in possession of a person, other than the original grantee or his legal heir, it shall be presumed, until the contrary is proved, that such person has acquired the land by a transfer, which is null and void under the provisions of sub-section (1) of Section 4. Since I have negated the contention of Shri Narayana Rao that the original grantees are not Scheduled Castes, it follows that the lands in question are granted lands within the meaning of clause (b) of sub-section (1) of Section 3 of the Act. Therefore, the burden is on the petitioners, who had admittedly come into possession of the lands in question, to establish that they have acquired title to the lands in question by a transfer, which is not null and void under the provisions of sub-section (21) of Section 4 of the Act. In the instant case, the petitioners have failed to discharge the said burden. On this ground also, the petition should fail. Secondly, the grants made in favour of the original grantees are admittedly free grants. The rule governing the grant prohibited alienation of the lands in question permanently. The lands in question were granted to a Scheduled Caste person taking into account their social backgrounds, poverty, illiteracy and their inherent weakness for being exploited by the affluent section of the society. Under these circumstances, the conditions were imposed that the grantees should not alienate the lands granted to them. Sections 66-A and 66-B of the Land Revenue Code authorise the State to resume the land for violation of the terms of the grant. Therefore, if the terms of the grants, which are hedged with conditions, and the class of persons to whom the lands are granted, are taken into account and considered, it is not possible to accept the contention of the learned counsel for the petitioners that the title in the lands had passed absolutely to the grantees. I am of the view that the title to the lands continued to remain in the State and what has been transferred to the grantees is the right to continue to be in possession of the lands granted to them and enjoy the same in perpetuity subject to the condition that they do not violate the conditions of the grant. This view of mine is supported by the Division Bench decision of this Court in the case of *Rudrappa v. Special Dy. Commr.*⁸, wherein in para 8 of the judgment, the Division Bench of this Court, while considering similar grants, has taken the view that the grantee was not given absolute title in respect of the land granted. The relevant portion of the judgment at para 8, reads as follows:

'8. ... It is clear from the terms of the grant that the appellant's predecessor-in-title, the grantee could not alienate the land for certain

period and if the land was alienated, it was open to the Government to cancel the grant and resume the land in question. If the grant was hedged in with several conditions of this nature, the same cannot be said to be absolute. Moreover, it must be noticed that the grant was made at an upset price. In the circumstances, proceedings initiated by the respondents cannot be stated to be barred by limitation nor is it possible to sustain the plea of adverse possession raised on behalf of the appellant.' "

3. In (2009) 7 SCC 161 (*Babulal Sharma v. State of Madhya Pradesh*) the Hon'ble Supreme Court has held that the revenue records are relevant in a suit for title and possession. As the revenue record shows that the disputed land is nazool that is government land which is relevant under Sections 35 and 74 of the Evidence Act, 1872. In such circumstances, the State of Uttar Pradesh is the recorded owner of the disputed premises and unless the State Government executes a registered instrument of lease under the provision of Section 107 of the Transfer of Property Act, 1882 no one can claim as lessee. As the plaintiffs have failed to produce any lease deed in their favour, they cannot be considered as owner of the disputed premises. Relevant paragraph nos.15 to 18 of the said judgment read as follows:

15. In our considered opinion reliance placed on the judgment of the various courts including the Supreme Court in respect of the land measuring 0.53 decimal which was allegedly sold by Mahadev Prasad Richharia, the ~~164~~ father of the appellant-plaintiff to Chhedilal Gupta is totally misplaced. The said land was transferred way back in the year 1945. We are here concerned with an area of land measuring 1.31 acres only. The said land is entered in the revenue records in the name of the Government of Madhya Pradesh. The Revenue Courts have given a finding against the appellant-plaintiff.

16. In the documents which are exhibited it is clearly mentioned that these are not cultivable lands but originally they were "khadans" (mines) and the same land was declared as nazool lands. Therefore, the revenue records which are referred to in the present case clearly depict that the land has all along been the government land. The land was also said to be in a ruinous state and therefore, there was no possession of the appellant-plaintiff with respect to the said land.

17. No argument for claiming a right by way of adverse possession was made before us which although was a plea taken in the courts below. The appellant-plaintiff has also admitted in his evidence that he has been residing outside the suit land. Therefore, it is clearly established that the appellant-plaintiff did not even have the possession of the suit land. Furthermore, there is no document to prove his title. He has not been able to prove and establish as to how Mahadev Prasad Richharia, his father came to own the said property which was a government land.

18. The oldest khasra entry which is available on record is Exhibit P-11 which pertains to the period of 1943-1944. In the said khasra entry names of the appellant-plaintiff are not recorded in any capacity whatsoever in the relevant columns. Rather, in the column meant for

the name of "kastkar" (cultivator) and his status, cross sign is shown whereas the nature of the land is shown as "BA AR RASTA". In the khasra corresponding to year 1951-1952 (Exhibit P-12) the name of the appellant-plaintiff is not mentioned at all in any capacity. The name of the appellant-plaintiff was recorded in the next year i.e. 1953-1954 which is Exhibit P-4 but there also the name of the appellant-plaintiff is recorded in Column 7 whereas Column 8 was meant to show the name of the cultivator occupying them. The nature of the land is not shown to be cultivable but is shown to be as "khadan" i.e. mines.

4. In AIR 1964 SC 1254 (*S.M. Karim. v. Mst Bibi Sakina*) the Hon'ble Apex Court has held that the alternative claim must be clearly made and proved, adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "a possible title" was not enough to raise such a plea. Long possession is not necessary adverse possession and prayer clause is not a substitute for a plea. Relying on the said ratio of law, it is submitted that as the plaintiffs have not pleaded adverse possession adequate in continuity, in publicity and extent and also have not shown the starting point of limitation in their plaint and the prayer clause is not a substitute for a plea, this suit is liable to be dismissed. Relevant paragraph nos.3 to 5 of the said judgment read as follows:

3. In this appeal, it has been stressed by the appellant that the finding clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because S. 66 of the Code of Civil Procedure bars it. That Section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser, and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the Section and the defendants were protected, by it.


4. It is contended that the case falls within the second sub-section under which a suit is possible at the instance of a third person who wishes to proceed against the property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer to the claims of creditors and not to the claims of transferees. The latter are dealt with in the first sub-section,

and if the meaning sought to be placed on the second sub-section by the appellant were accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under S. 66 of the Code.

As an alternative, it was contended before us that the title of Hakim Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukhan Das v. Krishnanand*, ILR 32 Pat 353 and *Sri Bhagwan Singh v. Ram Basi Kuer*, AIR 1957 Pat 157 to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakim Alam, Syed Aulad Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakim Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad*, AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

5. In (2005) 11 SCC 115 (*B. Leelavathi v. Honamma*) the Hon'ble Supreme Court has held that the adverse possession is a question of fact which has to be specifically pleaded and proved and in the absence of any plea of adverse possession, framing of an issue and adducing evidence could not be held that the plaintiffs had perfected towards the title by way of adverse possession. Relying on the said judgment, it is submitted that as the plaintiffs had not

pleaded settled ingredients of adverse possession in their plaint on the basis of framing of an issue and adducing evidence on the point cannot be held that the plaintiffs have perfected their title by way of adverse possession and the instant suit is liable to be dismissed with costs. Relevant paragraph nos.10 and 11 of the said judgment read as follows:

10. In our considered view, the High Court has erroneously set aside the judgment and decree passed by the trial court on the ground of non-issuance of notice by BDA to the plaintiff-respondent before executing the sale deed dated 21-5-1983 in favour of the appellant and that the plaintiff-respondent had perfected her title by way of adverse possession. Plea of non-issuance of show-cause notice by BDA before executing the sale deed in favour of the appellant was neither pleaded nor raised before the trial court. It was raised for the first time before the High Court. No issue had been framed in this respect. The plaintiff did not lead any evidence on this point. On the contrary, the case of the appellant and BDA was that Respondent 1 was present at the time when the sale deed was executed in favour of the appellant by BDA on 21-5-1983. DW 1, husband of the appellant has specifically deposed that  Respondent 1 was a consenting party to all the transactions and had visited the office of BDA along with the appellant at the time of the execution of the sale deed dated 21-5-1983. The High Court has not given any reasons to discard the testimony of DW 1. This was primarily a question of fact and in the absence of any pleadings and evidence on this point, the High Court has erred in holding that BDA did not issue a show-cause notice to the plaintiff before executing the sale deed in favour of the appellant.

11. Plea of adverse possession had been taken vaguely in the plaint. No categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honnamma, the plaintiff in her own statement did not say that she is in adverse possession of the suit property. We fail to understand as to how the High Court, in the absence of any plea of adverse possession, framing of an issue and evidence led on the point, could hold that the plaintiff-respondent had perfected her title by way of adverse possession.

6. (2008) 2 SCC 741 (*Dharamarajan v. Valliammal*) the Hon'ble Supreme Court has held that in a claim of adverse possession openness and adverse nature of the possession has to be proved against the owner of the property in question. Relying on the said judgment, it is submitted that the plaintiffs have failed to prove openness and adverse nature of possession against the owner of the property as they themselves do not know as to who is the owner of the property and they have not pleaded the name of the owner in the plaint and, as such, the suit is liable to be dismissed. Relevant paragraph 11 of the said judgment reads as follows:

11. In our opinion none of these questions could be said to be either question of law or a substantial question of law arising out of the

pleadings of the parties. The first referred question of law could not and did not arise for the simple reason that the plea of adverse possession has been rightly found against the plaintiff. Karupayee Ammal's possession, even if presumed to be a valid possession in law, could not be said to be adverse possession as throughout it was the case of the appellant Dharmarajan that it was a permissive possession and that she was permitted to stay on the land belonging to the members of the Iyer family. Secondly, it has nowhere come as to against whom was her possession adverse. Was it adverse against the Government or against the Iyer family? In order to substantiate the plea of adverse possession, the possession has to be open and adverse to the owner of the property in question. The evidence did not show this openness and adverse nature because it is not even certain as to against whom the adverse possession was pleaded on the part of Karupayee Ammal. Further even the legal relationship of Doraiswamy and Karupayee Ammal is not pleaded or proved. All that is pleaded is that after Karupayee Ammal's demise Doraiswamy as her foster son continued in the thatched shed allegedly constructed by Karupayee Ammal. There was no question of the tacking of possession as there is ample evidence on record to suggest that Doraiswamy also was in the service of Iyer family and that he was permitted to stay after Karupayee Ammal. Further his legal heirship was also not decisively proved. We do not, therefore, see as to how the first substantial question of law came to be framed. This is apart from the fact that ultimately the High Court has not granted the relief to the respondents on the basis of the finding of this question. On the other hand the High Court has gone into entirely different consideration based on reappraisal of evidence. The second and third questions are not the questions of law at all. They are regarding appreciation of evidence. The fourth question is regarding the admissibility of Exhibit A-8. In our opinion there is no question of admissibility as the High Court has found that Exhibit A-8 was not admissible in evidence since the Tahsildar who had issued that certificate was not examined. Therefore, there will be no question of admissibility since the document itself was not proved. Again the finding of the High Court goes against the respondent herein. Even the fifth question was a clear-cut question of fact and was, therefore, impermissible in the second appeal.

7. (1995) Supp 4 SCC 570 (*A.S. Vidyasagar v. S. Karunanandan*) the Hon'ble Supreme Court has held that permissive possession is not adverse possession and can be terminated at any time by the rightful owner. Relying on the said judgment, it is submitted that as the land in question has been recorded as government land and no lease deed has been executed in favour of the plaintiffs or their predecessors, they cannot claim for adverse possession as status of such occupants is only as a tenant on hold and as they have neither pleaded nor adduced any evidence to support the plea of openness, hostile and notoriety against the rightful owner as such their suit is liable to be dismissed. Relevant paragraph 5 of the said judgment reads as follows:

5. Adverse possession is sought to be established on the supposition that Kanthimathi got possession of the premises as a licensee and on

her death in 1948, the appellant who was 4 years of age, must be presumed to have become a trespasser. And if he had remained in trespass for 12 years, the title stood perfected and in any case, a suit to recovery of possession would by then be time-barred. We are unable to appreciate this line of reasoning for it appears to us that there is no occasion to term the possession of Kanthimathi as that of a licensee. The possession was permissive in her hands and remained permissive in the hands of the appellant on his birth, as well as in the hands of his father living then with Kanthimathi. There was no occasion for any such licence to have been terminated. For the view we are taking there was no licence at all. Permissive possession of the appellant could rightfully be terminated at any moment by the rightful owners. The present contesting respondents thus had a right to institute the suit for possession against the appellant. No oral evidence has been referred to us which would go to support the plea of openness, hostility and notoriety which would go to establish adverse possession. On the contrary, the Municipal Tax receipts, Exts. B-39 and 40, even though suggestedly reflecting payment made by the appellant, were in the name of Kuppuswami, the rightful owner. This negates the assertion that at any stage did the appellant assert a hostile title. Even by examining the evidence, at our end, we come to the same view as that of the High Court. The plea of adverse possession thus also fails. As a result fails this appeal. Accordingly, we dismiss the appeal, but without any order as to costs.

8. In (1995) 6 SCC 523 (*P. Periasami. v. P. Periathambi*) the Hon'ble Supreme Court has held that plea of adverse possession implies that someone else is the owner of the property. Relying on the said judgment it is submitted that as in their prayer the plaintiffs have sought relief on the basis of adverse possession it implies that someone else was the owner and they or their predecessors were not owner of the property. As such the suit on the basis of title is not maintainable and is liable to be dismissed with costs. Relevant paragraph 6 of the said judgment reads as follows:

6. With regard to the accreted property, there is a reference in the judgment under appeal relating to some accounting; after recording the finding that the defendants have failed to prove that that property was in their adverse possession. This is a finding of fact which need not be disturbed, as it has been sought to, in the cross-appeal. Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property. The failure of the plea has obvious results. If the parties herein were co-owners of that property and the said property had been purchased from the income derived from joint property, then obviously the same has to be accounted for as joint property and not as joint Hindu family property. It was like property jointly purchased by co-owners without attracting the rule of succession by way of survivorship. On this clarification, the judgment of the High Court is cleansed of the little vagueness about this particular which accidentally seems to have crept in while dealing with this aspect of the case.

9. IN AIR 1970 SUPREME COURT 2025 "Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhoddas Kalidas" the Hon'ble Supreme Court held that a party cannot be allowed to set up a case wholly inconsistent with that pleaded in there written statement. Relying on said judgment it is submitted that the plaintiffs who have pleaded in their written statements ante litem motam filed in other suit being tried analogously admitting that lastly prayer was offered on 16.12.1949 and thereafter they discontinued in possession now in the instant suit they cannot be allowed to raise their post litem motam statement that they offered prayer till 22nd or 23rd December 1949 which is wholly inconsistent with their earlier pleading. Besides that in the instant suit on one hand they claims possession based on title of Emperor Babur while on other hand they claim possession based on Adverse possession treating someone else owner of the property in question without disclosing even name of such owner; these two inconsistent plea cannot be allowed to be raised in one suit itself. Relevant paragraph 8 of the said judgment reads as follows:

"8. We may now proceed to examine the material on record for finding out the true character of the suit properties viz., whether they are properties of a public trust arising from their dedication of those properties in favour of the deity Shree Gokulnathji or whether the deity as well as the suit properties are the private properties of Goswami Maharaj. In her written statement as noticed, earlier, the 1st defendant took up the specific plea that the idol of Shri Gokulnathji is the private property of the Maharaj; the Vallabh Cult does not permit any dedication in favour of an idol and in fact there was no dedication in favour of that idol. She emphatically denied that the suit properties were the properties of the deity Gokulnathji but in this Court evidently because of the enormity of evidence adduced by the plaintiffs, a totally new plea was taken namely that several items of the suit properties had been dedicated to Gokulnathji but the deity being the family deity of the Maharaj, the resulting trust is only a private trust. In other words the plea taken in the written statement is that the suit properties were the private properties of the Maharaj and that there was no trust, private or public. But the case argued before this Court is a wholly different one viz., the suit properties were partly the properties of a private trust and partly the private properties of the Maharaj. The 1st defendant cannot be permitted to take up a case which is wholly inconsistent with that pleaded. This belated attempt to bypass the evidence adduced appears to be more a manoeuvre than a genuine explanation of the documentary evidence adduced. It is amply proved that ever since Mathuranathji took over the management of the shrine, two sets of account books have been maintained, one relating to the income and expenses of the shrine and the other relating to that of the Maharaj. These account books and other documents show that presents and gifts used to be made to the deity as well as to the Maharaj. The two were quite separate and distinct. Maharaj himself has been making gifts to the deity. He has been, at times utilising the funds belonging to the deity and thereafter reimbursing the same. The account books which have been produced clearly go to show that the deity and the Maharaj were treated as two different and distinct legal entities. The

evidence afforded by the account books is tell-tale. In the trial court it was contended on behalf of the 1st defendant that none of the account books produced relates exclusively to the affairs of the temple. They all record the transactions of the Maharaj, whether pertaining to his personal dealings or dealings in connection with the deity. This is an obviously untenable contention. That contention was given up in the High Court. In the High Court it was urged that two sets of account books were kept, one relating to the income and expenditure of the deity and the other of the Maharaj, so that the Maharaj could easily find out his financial commitments relating to the affairs of the deity. But in this Court Mr. Narasaraaju, learned Counsel for the appellant realising the untenability of the contention advanced in the courts below presented for our consideration a totally new case and that is that Gokulnathji undoubtedly is a legal personality; in the past the properties had been dedicated in favour of that deity; those properties are the properties of a private trust of which the Maharaj was the trustee. On the basis of this newly evolved theory he wanted to explain away the effect of the evidence afforded by the account books and the documents. We are unable to accept this new plea. It runs counter to the case pleaded in the written statement. This is not a purely legal contention. The 1st defendant must have known whether there was any dedication in favour of Shree Gokulnathji and whether any portion of the suit properties were the properties of a private trust. She and her advisers must have known at all relevant times the true nature of the accounts maintained. Mr. Narasaraaju is not right in his contention that the plea taken by him in this Court is a purely legal plea. It essentially relates to questions of fact. Hence we informed Mr. Narasaraaju that we will not entertain the plea in question."

10. In AIR 1984 SC 718 (*A.R. Antulay. v. Ramdas Srinivas Nayak & Anr.*) the Hon'ble Supreme Court has held that if a statute prescribe anything to do in any specific manner then, it should be done in the same manner. Relevant paragraph 22 of the said judgment reads as follows:

"22. Once the contention on behalf of the appellant that investigation under Section 5-A is a condition precedent to the initiation of proceedings before a Special Judge and therefore cognizance of an offence cannot be taken except upon a police report, does not commend to us and has no foundation in law, it is unnecessary to refer to the long line of decisions commencing from *Taylor v. Taylor*, (1875-76) 1 Ch D 426; *Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) and ending with *Chettiam Vettil Ammad v. Taluk Land Board*, (1979) 3 SCR 839 : (AIR 1979 SC 1573), laying down hitherto uncontroverted legal principle that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

11. In AIR 1983 SUPREME COURT 684 "*State of Bihar v. Radha Krishna Singh* = (1983) 3 SCC 118 the a Hon'ble Supreme court held that as there is a tendency on the part of an interested person or a party in order to grab, establish or prove an alleged claim to concoct, fabricate or procure false

genealogy to suit their ends, the Courts in relying on the genealogy put forward must guard themselves against falling into trap laid by a series of documents or a labyrinth of seemingly old genealogies to support their rival claims; as also that When a case of a party is based on a genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link is found to be missing then in the eye of law, the genealogy cannot be said to have been fully proved. Relying on said judgment the plaintiffs have failed to prove genealogy of the Mutwallis allegedly starting from the reign of Emperor Babur as such the suit is liable to be dismissed on this score alone. Relevant paragraph 18,19, 24,192 and 193 of the said judgment reads as follows:

“18. After a brief narration of the facts, mentioned above, before going to the oral, documentary and circumstantial evidence, it may be necessary to state the well established principles in the light of which we have to decide the conflicting claims of the parties. It appears that the plaintiff genealogy is the very fabric and foundation of the edifice on which is built the plaintiff's case. This is the starting point of the case of the plaintiff which has been hotly contested by the appellant. In such cases, as there is a tendency on the part of an interested person or a party in order to grab, establish or prove an alleged claim, to concoct, fabricate or procure false genealogy to suit their ends, the courts in relying on the genealogy put forward must guard themselves against falling into the trap laid by a series of documents or a labyrinth of seemingly old genealogies to support their rival claims.

19. The principles governing such cases may be summarised thus :

(1) Genealogies admitted or proved to be old and relied on in previous cases are doubtless relevant and in some cases may even be conclusive of the facts proved but there are several considerations which must be kept in mind by the courts before accepting or relying on the genealogies.

(a) Source of the genealogy and its dependability.

(b) Admissibility of the genealogy under the Evidence Act.

(c) A proper use of the said genealogies in decisions or judgments on which reliance is placed.

(d) Age of genealogies.

(e) Litigations where such genealogies have been accepted or rejected.

(2) On the question of admissibility the following tests must be adopted:

(a) the genealogies of the families concerned must fall within the four corners of S. 32 (5) or S. 13 of the Evidence Act.

(b) They must not be hit by the doctrine of post litem motam.

(c) The genealogies or the claims cannot be proved by recitals, depositions or facts narrated in the judgment which have been held by a long course of decisions to be inadmissible.

(d) where genealogy is proved by oral evidence, the said evidence must clearly show special means of knowledge disclosing the exact source, time and the circumstances under which the knowledge is acquired, and this must be clearly and conclusively proved.

24. It is well settled that when a case of a party is based on a genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link is found to be missing then in the eye of law the genealogy cannot be said to have been fully proved. In the instant case, although the plaintiffs have produced oral and documentary evidence to show that Ramruch Singh and Debi Singh were brothers being the sons of Bansidhar Singh this position was not accepted by the trial court as also by M. M. Prasad, J. who dissented from the other two Judges constituting the Special Bench who had taken a contrary view and had held that the plaintiffs had fully proved the entire genealogy set-up in the plaint. This, therefore, makes our task easier because we need not discuss in detail the evidence and documents to show the connection of the plaintiffs up to the stage of Gajraj Singh though we may have to refer to the evidence for the purpose of deciding the main issue, viz., whether or not Gajraj Singh was the son of Ramruch Singh and Ramruch Singh a brother of Debi Singh and son of Bansidhar Singh.

192. Before, however, opening this chapter it may be necessary to restate the norms and the principles governing the proof of a pedigree by oral evidence, in the light of which the said evidence would have to be examined by us. It is true that in considering the oral evidence regarding a pedigree a purely mathematical approach cannot be made because where a long line of descent has to be proved spreading over a century, it is obvious that the witnesses who are examined to depose to the genealogy would have to depend on their special means of knowledge which may have come to them through their ancestors but, at the same time, there is a great risk and a serious danger involved in relying solely on the evidence of witnesses given from pure memory because the witnesses who are interested normally have a tendency to draw more from their imagination or turn and twist the facts which they may have heard from their ancestors in order to help the parties for whom they are deposing. The Court must, therefore safeguard that the evidence of such witnesses may not be accepted as is based purely on imagination or an imaginary or illusory source of information rather than special means of knowledge as required by law. The oral testimony of the witnesses on this matter is bound to be hearsay and their evidence is admissible as an exception to the general rule where hearsay evidence is not admissible. This is culled out from the law contained in Cl. (5) of S. 32 of the Evidence Act which must be construed to the letter and to the spirit on which it was passed.

193. In order to appreciate the evidence of such witnesses, the following principles should be kept in mind:

- (1) The relationship or the connection however close it may be, which the witness bears to the persons whose pedigree is sought to be deposed by him.
- (2) The nature and character of the special means of knowledge through which the witness has come to know about the pedigree.
- (3) The interested nature of the witness concerned.

(4) The precaution which must be taken to rule out any false statement made by the witness post litem motam or one which is derived not by means of special knowledge but purely from his imagination, and

(5) The evidence of the witness must be substantially corroborated as far as time and memory admit."

12. In AIR 1983 SUPREME COURT 684 "State of Bihar v. Radha Krishna Singh = (1983) 3 SCC 118 the a Hon'ble Supreme Court in respect of admissibility of the documents has laid down principle of law relying where on it is submitted that the documents filed by the petitioner in the instant suit are not admissible. Relevant paragraph 35 of the said judgment reads as follows:

"35. In our opinion, Ex. J. squarely falls within the four corners of S. 35 of the Evidence Act which requires the following conditions to be fulfilled before a document can be admissible under this section.

(1) the document must be in the nature of an entry in any public or other official book, register or record,

(2) it must state a fact in issue or a relevant fact,

(3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept."

13. In AIR 1983 SUPREME COURT 684 "State of Bihar v. Radha Krishna Singh = (1983) 3 SCC 118 the a Hon'ble Supreme Court in respect of admissibility and probative value of the documents has laid down principle of law relying where on it is submitted that the documents filed by the Plaintiffs in the instant suit are not admissible. Relevant paragraph 40,47 and 52 of the said judgment reads as follows:

"40. The admissibility of Ex J., or its genuineness is only one side of the picture and in our opinion, it does not throw much light on the controversial issues involved in the appeal. We may not be understood, while holding that Ex. J. is admissible, to mean that all its recitals are correct or that it has very great probative value merely because it happens to be an ancient document. Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. Before going to the contents of Ex. J., which have been fully discussed by the High Court, we would first like to comment on the probative value of this document.

47. We would like to mention here that even if a document may be admissible or an ancient one, it cannot carry the same weight or probative value as a document which is prepared either under a Statute, Ordinance or an Act which requires certain conditions to be fulfilled. This was the case in both Ghulam Rasul Khan's (AIR 1925 PC 170) and Shyam Pratap Singh's cases (AIR 1946 PC 103) (supra).

52. Finally, Ex. J., unlike the document in the case (1874-I Ind App 209) before the Privy Council was not a Report under any statutory authority but was merely a report submitted on the administrative

orders of a high Government official. In our opinion, therefore, where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has a statutory favour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight."

14. In AIR 1983 SUPREME COURT 684 "State of Bihar v. Radha Krishna Singh = (1983) 3 SCC 118 the a Hon'ble Supreme Court in respect of admissibility of the Judgments has laid down principle of law relying where on it is submitted that the judgment dated 24.12.1885 passed by Ld. Sub Judge Faizabad Sri Harikishan in Suit No. 61/280 of 1885 between Mahant Rghubardas v. Secretary of State & Anr as well as Judgment dated 18/26.03.1886 passed by Ld. District Judge Faizabad Mr. F.E.A. Chamier in Civil Appeal No.27 of 1885 preferred against said order of the Ld. Sub Judge Faizabad as well as the Judgment dated 30.03.1946 passed by Ld. Civil Judge Faizabad Sri S.A. Ahsan in Suit No. 29 of 1949 between Shia Central Board U.P. Wqfs vs. Sunni Central Board U.P. Waqfs filed by the Plaintiffs in the instant suit not being Judgment in rem or the judgment between the same parties are not admissible in evidence and not reliable for extracting inferences. Relevant paragraph 121,122,133 and 143 of the said judgment reads as follows:

"121. Some Courts have used Section 13 to prove the admissibility of a judgment as coming under the provisions of S. 43, referred to above. We are, however, of the opinion that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other general provisions in order to make a particular document admissible. In other words if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of S. 43 otherwise it cannot be relevant under S. 13 of the Evidence Act. The words "other provisions of this Act" cannot cover S. 13 because this section does not deal with judgments at all.

122. It is also well settled that a judgment in rem like judgments, passed in probate, insolvency, matrimonial or guardianship or other similar, proceedings, is admissible in all cases whether such judgments are inter partes or not.

In the instant case, however, all the documents consisting of judgments filed are not judgments in rem and therefore, the question of their admissibility on that basis does not arise. As mentioned earlier, the judgments filed as Exhibits in the instant case, are judgments in personam and, therefore, they do not fulfil the conditions mentioned in S. 41 of the Evidence Act.

133. The cumulative effect of the decisions cited above on this point clearly is that under the Evidence Act a judgment which is not inter partes is inadmissible in evidence except for the limited purpose of proving as to who the parties were and what was the decree passed and the properties which were the subject matter of the suit. In these circumstances, therefore, it is not open to the plaintiffs-respondents to derive any support from some of the judgments which they have filed in order to support their title and relationship in which neither the

plaintiffs nor the defendants were parties. Indeed, if the judgments are used for the limited purpose mentioned above, they do not take us anywhere so as to prove the plaintiffs' case.

143. Thus, summarising the ratio of the authorities mentioned above, the position that emerges and the principles that are deducible from the aforesaid decisions are as follows :

(1) A judgment in rem e.g., judgments or orders passed in admiralty, probate proceedings, etc., would always be admissible irrespective of whether they are inter partes or not,

(2) judgments in personam not inter partes are not at all admissible in evidence except for the three purposes mentioned above. “

(3) On a parity of aforesaid reasoning, the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parties.

(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

(5) Statements, declarations or depositions, etc., would be admissible if they are post litem motam.”

15. In AIR 1983 SUPREME COURT 684 “State of Bihar v. Radha Krishna Singh = (1983) 3 SCC 118 the a Hon’ble Supreme Court held that Statements, declarations or deposition etc. are not admissible if they are post litem motam. The statements or declarations before persons of competent knowledge made ante litem motam are receivable to prove ancient rights of a public or general nature. The admissibility of such declarations is however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases made ante litem motam, the element of bias and concoction is eliminated . Before, however, the statements of the nature being ante litem motam they must be not also before the actual existence of any controversy but they should be made even before the commencement of legal proceedings. Relying on said judgment it is submitted that the Statements made ante litem motam that last prayer was offered on 16.12.1949 and thereafter the plaintiffs discontinued it, cannot make contrary statement in this suit that they offered prayer till 23rd December 1949 with sole motive to save limitation as the instant suit was instituted on 18th December 1949 as also; that the plaintiffs’ ante litem motam stand was that the waqf was created by Emperor Babur now in the instant suit they cannot be allowed to take benefit of contrary statement that someone else was the owner and they are entitled for decree on the ground of adverse possession. Relevant paragraph 134 and 135 of the said judgment reads as follows:

“134. It is also well settled that statements or declarations, before persons of competent knowledge made ante litem motam are receivable to prove ancient rights of a public or general nature vide Halsbury’s’ Laws of England (Vol. 15 : 3rd Edition, A. 308) where the following statement is to be found :

“Declarations by deceased persons of competent knowledge, made ante litem motam, are receivable to prove ancient rights of a public or general nature. The admission of declarations as to those rights is allowed partly on the ground of necessity, since without such evidence ancient rights could rarely be established; and partly on the ground that the public nature of the rights minimises the risks of misstatement.”

135. The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam. the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being ante litem motam they must be not only before the actual existence of any controversy but they should be made even before the commencement of legal proceedings. In this connection, in para 562 at page 308 of Halsbury's Laws of England (supra) the following statement is made :

“To obviate bias, the declarations must have been made ante litem motam, which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy, concerning the subject matter of the declarations. So strictly has this requirement been enforced that the fact that such a dispute was unknown to the declarant or was fraudulently begun with a view to shutting out his declarations has been held immaterial.”

PART -XXXIII

EXCAVATION REPORT OF THE ARCHAEOLOGICAL SURVEY OF INDIA BEING A SCIENTIFIC REPORT OF THE EXPERTS AGAINST WHOM BIAS OR MALAFIDE HAVE NOT BEEN PROVED IS LIABLE TO BE ADMITTED AND RELIED ON AS A PIECE OF EVIDENCE:

1. In AIR 1940 PC 3 (*Chandan Mull Indra Kumar & Ors. V. Chimanlal Girdhar Das Parekh & Anr.*) the Hon'ble Privy Council held that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a commissioner whose integrity and carefulness is unquestionable whose careful and laborious execution of task was proved by his report and who had not blankly adopted the assertions of either party. Relying on the said judgment, it is respectfully submitted that the report of the Archaeological Survey of India is an elaborate report and the persons comprising excavation team of the ASI were working directly under the control and direction of this Hon'ble Court. And their integrity is unquestioned as such the said report is entitled to be accepted in its entirety as an expert scientific report under Order 26 Rule 9 & 10 & 10A as also under Section 75(e) of the Code of Civil Procedure, 1908 as well as under Section 45 of the Evidence Act, 1872. Relevant paragraph from page 6 of the said judgement reads as follows:

"It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined land sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.

This in their Lordships' judgment is a correct statement of the principle to be adopted in dealing with the commissioner's report."

2. In 2004(6) SCC 378 (*Vareed Jacob v. Sosamma Geevarghese*) the Hon'ble Supreme Court held that "incidental" or "ancillary" proceedings are taken recourse to in aid of the ultimate decision of the suit and any order passed therein would have a bearing on the merit of the matter. "Supplemental proceedings", however, mean a separate proceeding in an original action in which the court where the action is pending is called upon to exercise its jurisdiction in the interest of justice. Supplemental proceedings may not affect the ultimate result of suit and a supplemental order can be passed even at the instance of the defendants. Relying on the said judgment it is submitted that as Section 75(e) is being part and parcel of Part-III titled as incidental proceedings of the Code of Civil Procedure, 1908 whereunder the order was passed by this Hon'ble Court to carry out the excavation work and submit the report before this Hon'ble court and the report submitted in compliance of said order of the Hon'ble Court is a scientific report under Section 45 of the Evidence Act, 1872. The said report is reliable and admissible valuable piece of evidence. Relevant paragraph Nos.29 to 33 and 54 of the said judgment read as follows:


“29. The Code of Civil Procedure uses different expressions in relation to incidental proceedings and supplemental proceedings. Incidental proceedings are referred to in Part III of the Code of Civil Procedure whereas supplemental proceedings are referred to in Part VI thereof.

30. Is there any difference between the two types of proceedings?

31. A distinction is to be borne in mind keeping in view the fact that the incidental proceedings are in aid to the final proceedings. In other words, an order passed in the incidental proceedings will have a direct bearing on the result of the suit. Such proceedings which are in aid of the final proceedings cannot, thus, be held to be at par with supplemental proceedings which may not have anything to do with the ultimate result of the suit.

32. Such a supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. The supplemental proceedings may not be taken recourse to as a routine matter but only when an exigency arises therefor. The orders passed in the supplemental proceedings may sometimes cause hardships to the other side and, thus, are required to be taken recourse to when a situation arises therefor and not otherwise. There are well-defined parameters laid down by the court from time to time as regards the applicability of the supplemental proceedings.

33. Incidental proceedings are, however, taken recourse to in aid of the ultimate decision of the suit which would mean that any order passed in terms thereof, subject to the rules prescribed therefor, would have a bearing on the merit of the matter. Any orders passed in aid of the suit are ancillary powers. Whenever an order is passed by the court in exercise of its ancillary power or in the incidental proceedings, the same may revive on revival of the suit. But so far as supplemental proceedings are concerned, the court may have to pass a fresh order.

 **399 54.** Parliament consciously used two different expressions “incidental proceedings” and “supplemental proceedings” which obviously would carry two different meanings.”

3. In (2006) 13 SCC 136 (*G.L. Vijan v. K. Shankar*) the Hon’ble Supreme Court held that incidental power is to be exercised in aid to the final proceedings. In other words an order passed in the incidental proceedings will have a direct bearing on the result of the suit. Such proceedings which are in aid of the final proceedings, cannot, thus, be held to be on par with supplemental proceedings which may not have anything to do with the ultimate result of the suit. Relying on the said judgment it is submitted that since the ASI report is result of an incidental proceeding which is in aid of the final proceeding the said report is reliable to do the ultimate justice. Relevant paragraph no.11, 13 & 14 of the aforesaid judgment read as follows:

“11. Such a supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. Supplemental proceedings may not be taken recourse to in a routine manner but only when an exigency of situation arises therefor. The orders passed in the supplemental proceedings may sometimes cause hardships to the other

side and, thus, are required to be taken recourse to when it is necessary in the interest of justice and not otherwise. There are well-defined parameters laid down by the Court from time to time as regards the applicability of the supplemental proceedings.

13. The expression “ancillary” means aiding; auxiliary; subordinate; attendant upon; that which aids or promotes a proceeding regarded as the principal.

14. The expression “incidental” may mean differently in different contexts. While dealing with a procedural law, it may mean proceedings which are procedural in nature but when it is used in relation to an agreement or the delegated legislation, it may mean something more; but the distinction between an incidental proceeding and a supplemental proceeding is evident.

4. In AIR 1924 Cal 620 (*Amrita Sundari v. Munshi*) the Hon’ble Calcutta High court held that the Commissioner whose integrity is unquestioned his elaborate report cannot be overruled by the Court. Relying on the said judgment it is submitted that as the ASI is a reputed institution and integrity of its team cannot be questioned, the report submitted by the ASI is to be accepted.
5. In AIR 1979 Cal 50 (*M/s. Roy & Co. & Anr. v. Nanibala Dey & Ors.*) the Hon’ble Calcutta High Court held that the Court should not act as an expert and overrule the Commissioner’s report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. Relying on the said judgment it is humbly submitted that here there are only wild allegations that the ASI people acted under the influence of the then BJP Government and the then Hon’ble Human Resources Development Minister Mr. Murali Manohar Joshi which has not been substantiated by giving cogent evidence and the plaintiffs had several opportunities to make applications before this Hon’ble court impeaching the integrity of the ASI archaeologists but in spite of that opportunity they did not do anything and when after submission of the report of the ASI they found that there is finding of the ASI team that on the disputed site there was temple. They filed the objection which cannot be accepted and is liable to be rejected. Relevant paragraph no.7 of the aforesaid judgment reads as follows:

“7. Then about the report of the Pleader Commissioner. Reference may be made to the famous decision of the Judicial Committee in Chandan Mull’s case reported in 44 Cal WN 205 at p. 212 : (AIR 1940 PC 3, at pp. 5, 6) to show that the Commissioner’s report should not be rejected except on clearly defined and sufficient grounds. The Court should not act as an expert and overrule the Commissioner’s report whose integrity and carefulness are not questioned and who did not blindly accept the assertion of either party. Here the Pleader Commissioner’s honesty has not been challenged. He did not blindly adopt the assertion of the plaintiff. As stated before, several chances were given to the defendant-appellants to assail the Commissioner’s report, but no objection was filed. Hence at this stage this objection against the Commissioner’s report cannot be accepted.”
6. In 2006 (4) Bom LR 336 (*Bapu Dhopndi Devkar v. S. Najaokar*) the Hon’ble Bombay High Court held that a document can be sent to the experts for

examination and opinion about the date of printing and the period when it was circulated. Relying on the said judgment it is submitted that as the report of Forensic Science Laboratory, which has stated that there is interpolation in the relevant documents and Babri Masjid is later insertion by the different person in different handwriting in different inks the said report is reliable and the revenue records submitted by the plaintiffs are liable to be discarded and they should be read in the light of the report of Forensic laboratory. Relevant extract of the said judgment as quoted in Sarkar's Code of Civil Procedure, Vol-2 10th Edn. reads as follows:

"Under Rule 10A, a document, in the instant case a revenue stamp, can be sent to the General Manager Indian Security Press for examination and opinion about the date of printing and the period when it was circulated."

(*Ibid.* p.1789)

7. In AIR 1997 Cal 59 (*Amena Bibi v. Sk. Abdul Haque*) the Hon'ble Calcutta High Court held that the Commissioner's report even if accepted by itself does not however, mean that the parties are precluded from challenging the evidence of the Commissioner or assailing the report by examining any other witness to counter the effect of the report. The said Hon'ble Court has also held that the parties having participated in the enquiry made by the Commissioner should not be allowed to turn around and say that the enquiry was biased and prejudicial. Relying on the said judgment it is submitted that as the plaintiffs, their experts, nominees, advocates have participated in excavation proceedings and the excavation proceedings was done in presence and under observation of the observers appointed by this Hon'ble Court now the ASI report which reveals that there was a temple, the plaintiffs cannot be allowed to raise objection and their objection is liable to be rejected. Moreover, as the parties have already examined several experts to countermand the effect of the ASI report the ASI report is liable to be admitted and taken as a valuable piece of evidence. Relevant paragraph no.6 & 7 of the aforesaid judgment read as follows:

"6. On a careful reading of the above decision it indicates that the valuation of the property for which the prayer under S. 4 of the Partition Act is made, has to be fixed on the prevalent market value at the time of filing an application under S. 4 of the Partition Act. On reading the impugned order, it is implicit that the learned Court below has meticulously examined the merits of the contention of petitioners and rejected those objections inasmuch as the Commissioner had met those points raised by the revision petitioner. It appears that the Commissioner fixed the valuation after taking the evidence from the parties. The petitioners having participated in the enquiry should not be allowed to turnround and say that the enquiry was biased and prejudicial.

7. Mr. Mukherjee, the learned counsel appearing for the opposite party No. 1, has seriously challenged about the maintainability of the revisional application. It is highlighted that the Commissioner's report should not be rejected except on clearly defined and sufficient grounds. The court should not act as an expert and overrule the Commissioner's report whose integrity and carefulness are not questioned. In support of his contention Mr. Mukherjee

relied on a decision reported in AIR 1979 Cal 50 (M/s. Roy and Co. v. Smt. Nani Bala Dey). The Court held :—

“The Commissioner’s report should not be rejected except on clearly defined and sufficient grounds. The Court should not act as an expert and overrule the Commissioner’s report whose integrity and carefulness are not questioned and who did not blindly accept the assertions of either party. “

Admittedly the petitioners have not challenged either the integrity of the Commissioner or his carefulness. In another decision reported in AIR 1940 PC 3 in the case of Chandan Mull Indra Kumar v. Chinman Lal Girdhar Das Parekh. It was held :-

“Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.”

From the ratio of the above decision, it is (sic) that the revisional court would be slow and war while entertaining the objection regarding the acceptance of the Commissioner’s report in a revisional application. The Commissioner’s report even if accepted by itself does not, however, mean that the parties are precluded from challenging the evidence of the Commissioner or assailing the report by examining any, other witnesses to countermand the effect of the report. It has been held in a decision reported in AIR 1966 Orissa 121 in the case of Harihor Misra v. Narhari Setti Sitaramiah (para 4) :—

“Rule 10 of O. 26 does not make the report of the Commissioner as concluding the question of valuation. On the contrary, the rule gives clear indication that the report of the Commissioner is only one of the pieces of evidence amongst other evidence to be led by the parties for determination of the issue on valuation of the suit. When the parties file no objection to the Commissioner’s report, the court rightly accepts the report. Its acceptance by itself does not, however, mean that parties are precluded from challenging the evidence of the Commissioner and the witnesses examined by him or by giving any other evidence to countermand the effect of the Commissioner’s report. “

Thus, from the underlying principle emerging from the above cases, it is manifest that the party objecting to the Commissioner’s report can lead best possible evidence at the time of hearing to countermand the report even if the same was accepted earlier. The Court on taking the comprehensive view decide the point at issue and arrive at right conclusion I do not find at this stage any justification to interfere with the findings of the learned trial court order accepting the Commissioner’s report.”

8. In AIR 1976 Alld. 121 (*State of U.P. v. Smt. Ram Sree & Anr.*) the Hon’ble Allahabad High Court held that it is not necessary in order that the report

becomes evidence the statement of the commissioner should also be made in the court for the purpose of proving it. It is up to the choice of the party to examine the commissioner in respect of the matters, referred to him or mentioned in his report. But the examination of the Commissioner is not at all required by the provisions of Order XXVI Rule 10(2) of Civil Procedure Code for the purpose of proving the report. Relying on the said judgment, it is respectfully submitted that as none of the parties made application for examination of the ASI's archaeologists/experts who took part in excavation proceeding and prepared the report thereon, for the purpose of proving the said report there is no need of examination of the ASI's team of archaeologist and the said report is liable piece of evidence. Relevant paragraph no.33 of the aforesaid judgment reads as follows:

"33. Order XXVI Rule 10 (2) of Civil P. C. lays down that the report of the commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. It is, therefore, clear from the aforesaid provision that it is not necessary in order that the report becomes evidence that the statement of the commissioner should also be made in the court for the purpose of proving it. It is up to the choice of the party to examine a commissioner in respect of the matters referred to him or mentioned in his report. But the examination of the commissioner is not at all required by the aforesaid provision for the purpose of proving the report. The case relied upon by the learned counsel for the respondent in *Haji Kutubuddin v. Allah Banda* (AIR 1973, All. 235) is not at all relevant on the above controversy. In this case, the High Court did not hold that the statement of the commissioner was necessary in order to prove it or that without such a statement the same could not be read in evidence. We, therefore, do not accept the submission of the learned counsel for the respondent that the report of the first commissioner was not admissible as he had not been produced as a witness."

9. In AIR 1976 Del 175 (*Harbhajan Singh v. Smt. Sakuntala Devi Sharma & Anr*) the Hon'ble Delhi High Court held that the Commissioner's report is admissible as evidence even as substantive evidence without examination of commissioner. In the said judgment it has also been held that before relying on report the authority is bound to consider and decide objections. Relying on the said judgment, it is humbly submitted that before relying on the said ASI report, this Hon'ble Court is to reject the objections of the plaintiffs and as none of the parties have made application for examination ASI archaeologists' report is a substantive evidence and is fit for being admitted without examination of the archaeologists of the ASI. Relevant paragraph no.5 & 7 of the aforesaid judgment read as follows:

"5. The first contention urged on behalf of the tenant is that the report of the Commissioner and the evidence recorded by him and enclosed with the report did not constitute legal evidence and could not, therefore, be considered by the Authority unless the Commissioner had proved the report as a witness and had been subjected to cross-examination. This contention, to my mind, is untenable because on the principle incorporated in Rule 10 (2) of Order 26 of the Code of Civil Procedure,

the report and the evidence would be evidence in the proceedings in which the Commissioner is appointed. Sub-rule (2) of Rule 10 is in the following terms:-

“The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.”

It is obvious from the aforesaid sub-rule that the report of the Commissioner and the evidence, although not the evidence without the report, would be evidence in the proceedings in which the Commissioner is appointed although the Court has the power, as indeed, the parties a right to examine the Commissioner personally in the Court touching any of the matters referred to by him in the report or as to the manner in which he has made the investigation. In the present case, the Commissioner had been appointed in the presence of both the parties. The parties were, therefore, aware that the Commissioner had been deputed to make a local investigation. The report of the Commissioner along with the evidence had been duly submitted in the Court. Although the tenant submitted his objections to the report but made no attempt either to summon the Commissioner or to seek an opportunity to cross-examine the Commissioner.

7. It is next contended that, in any event, the report and the material enclosed by the Commissioner with it could not be substantive evidence and at best could be utilised to corroborate other evidence on the question in controversy. This contention seems to be untenable because if the report of the Commissioner and the material enclosed with it constituted legal evidence, and I have held above that it did, I do not see how it could not be used as a substantive piece of evidence to base the finding. The Authority had appointed the Commissioner to inspect the spot, to make an investigation and to submit a report and the Authority was entitled to accept the same and base its finding on such material.”

10. In AIR 1973 AP 168 (*Vemuseti Appayamma v. Lakshman Sahu*) the Hon'ble Andhra Pradesh High Court held that report of Commissioner is a part of record and can be considered as evidence irrespective of the fact that the commissioner is examined as witness or not. Relying on the said judgment, it is submitted that the report of the ASI is fit for being considered as evidence in spite of the fact that the persons who have taken part in excavation process and in preparation of the report have not been examined as none of the parties had made application for their examination. Relevant paragraph no.6 of the aforesaid judgment reads as follows:

“6. The learned counsel for the appellant however, objects to the Commissioner's report being accepted and acted upon without its being marked and without the Commissioner being examined. But when the Court appoints a Commissioner under O. 26, R. 9, C.P.C. for making

a local inspection and to submit a report, the Commissioner is given the discretion to make a local inspection and record evidence if necessary and submit a report together with such evidence as he thinks fit. Under sub-rule (2) of Rule 10 of Order 26, C.P.C., the report of the Commissioner and the evidence taken by him form part of the record. When the Rule lays down that it forms part of the record irrespective of whether it is marked or not, the Court is bound to take that evidence into consideration. The failure to mark it as a document on behalf of the parties does not exclude it from the record. Sub-rule (2), however, lays down that either the Court or any of the parties may examine the Commissioner but if the Commissioner is not examined, the report submitted by him does not cease to form part of the record. It is nowhere laid down that unless the Commissioner is examined and through him his report is marked as an exhibit, the report of the Commissioner cannot be acted upon. That being so, the lower Appellate Court was right in considering the Commissioner's report and in, accepting the defendant's evidence and rejecting that of the plaintiff's witnesses in the light of that. The finding whether the plaintiff is in possession of the plaintiff schedule site or not is a finding of fact which is supported by the evidence on record and is binding on this Court in Second Appeal."

11. In AIR 1985 Guj 34 (*Jagat Bhai Punja Bhai Palkhiwala & Ors. v. Vikram Bhai Punja Bhai Palkhiwala & Ors.*) the Hon'ble Gujrat High Court held that where the Commissioner was appointed to make inventory only and he was not appointed to take possession of the documents even if he was appointed to take possession of the documents, it would not have made any difference under Order 26 Rule 10B. The appointment is to perform merely a ministerial act and only those acts which are covered by sub-r.(1) i.e. ministerial acts, to which only sub-r.(2) would apply so as to attract the application of sub-r.10(2). Therefore, the report of the Commissioner for the performance of that ministerial act and the evidence if he had recorded himself would be evidence under Rule 10(2) but not whatever documents that may be incidentally or in course of the ministerial duty come to his notice and he may take possession there. Such collection of document is not recording of evidence and he was not appointed for that purpose. Relying on the said judgment it is submitted that the ASI excavation team was not appointed to collect the bones from the different strata and get those bones chemically examined. As such though the ASI excavation team has collected bones and made inventory thereof which was not necessary for drawing the conclusion that whether there was any existing structure prior to 16th century or not. As such challenge to the ASI report on this superficial ground is liable to be rejected. Relevant paragraph no.11, & 17 of the aforesaid judgment read as follows:

"11. Since sub-r.(2) applies the provisions of R.10(2) that also may be reproduced here for easy reference.

Rule-10(2) "The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form the part of record, the Court or with the permission of the Court, any of the parties to the suit may examine the

Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation”

17. Moreover, the Commissioner was appointed to make inventory only and he was not appointed to take possession of the documents. Even if he was appointed to take possession of the documents, it would not have made any difference. Under O.26 R.10B the appointment is to perform merely a ministerial act and only those acts which are covered by sub-r.(1) i.e. ministerial acts, to which only that sub-r.(2) will apply so as to attract the application of sub-r.10(2). Therefore, the report of the Commissioner for the performance of that ministerial act and the evidence if he has recorded himself would become the part of the record in the suit under R.10(2), but not whatever documents that may be incidentally or in course of the ministerial duty come to his notice and he may take possession thereof. Such collection of documents is not recording of evidence and he was not appointed for that purpose and if the appointment is construed to such an extent as contended by the petitioners, such appointment would be ultra vires the scope of R.10 B. R.10 B read with R.10 does not make any radical departure suggested by the learned Counsel for the petitioners. In fact their contention is against the common sense and ordinary rules of convenience and proper conduct of a litigation. Neither the language nor the spirit nor the purpose of R 10B justifies such radical departure from the ordinary rules of procedure and evidence which are meant to facilitate convenient trial and fair opportunity to the other side.”

12. In AIR 1994 KERALA 179 “C.K. Rajan v. State” the Hon’ble High Court Kerala held that The provisions of O. XXVI, R. 10 of the Civil P.C. is inapplicable to proceedings under Art. 226 of the Constitution of India. However, the Court, in exercising the powers under Art. 226, can appoint a Commissioner. The Commissioner so appointed by the Court must be responsible persons who enjoy the confidence of the Court and who are expected to carry out the assignment objectively and impartially without any predilection or prejudice. The report of the Commissioner should be served on all the parties or made known to the public. If any person wants to dispute any of the fact or data stated in the report, he may take steps in that regard by filing an affidavit or by leading evidence. If the Commissioner so appointed by the Court to hold enquiry, considered facts and circumstances and made local inspection and discussed the matter with the parties and submitted a report containing reasoned findings, prima facie it constitutes evidence which can be acted by a Court of law. Interference with the result of a detailed and careful report so submitted should be made only for cogent and compelling reasons. In a case where an elaborate report is filed by the Commissioner, whose integrity, credibility and carefulness are not questioned, whose careful and laborious execution of his task is proved by the report itself, interference will be made only in exceptional circumstances, in cases where convincing evidence contra is available before Court. Relying on said judgment it is submitted that as no compelling reasons and convincing evidences contra are available before this Hon’ble Court the said report constitutes evidence which can be acted by a

Court of law. Relevant paragraph nos. 18 and 19 of the said judgment read as follows:

“18. We shall now inform ourselves as to the value and weight to be placed on the report submitted by the Commissioner appointed by this Court, Shri Krishnan Unni, District Judge. Shri Krishnan Unni is a senior Selection Grade District Judge with considerable experience and background. He is a judicial officer of repute and credibility. None of the parties, who appeared before us, at any point of time, questioned the capacity, credibility and integrity of Shri Krishnan Unni. The Commissioner has submitted fifteen interim reports and the final report in two volumes. He has taken enormous pains to meet various persons, gather details and discuss all aspects that arose for consideration. He took the trouble for personally inspecting very many places on many occasions. A bare perusal of the fifteen interim reports and the final reports, which contain more than 500 pages, will go to show that the Commissioner has done the job entrusted to him with remarkable ability and skill. The Commissioner has posed the question that arose for consideration in a straight forward manner and in the real perspective. The details of all aspects that arose for consideration were adverted to and the pros and cons were considered with remarkable ability. After a discussion of various aspects and perusal of various materials that were available, the Commissioner has entered specific findings and has made specific recommendations. It is true that the provisions of O. XXVI, R. 10 of the Code of Civil Procedure is inapplicable to proceedings under Art. 226 of the Constitution of India. Even before the Code of Civil Procedure came into force, the Judicial Committee of the Privy Council had occasion to remind the Courts in India about the approach to be made regarding a Commissioner's report made on local enquiry. In *Ranee Surut Soondree Debea v. Baboo Prosanna Coomar Tagore*, (1869-70) 13 Moo Ind App 607 at page 617, the Judicial Committee of the Privy Council after stating that interference with the result of a local enquiry should be only upon clearly defined and sufficient grounds, stated the law thus :

“The integrity of the Ameen (Commissioner) is unquestioned; this careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, Their Lordships think it sufficient to say that they see no ground for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this case depends.”

In *Chandan Mull v. Chiman Lal*, AIR 1940 PC 3 at page 6, the Judicial Committee again laid down the correct statement of the principle to be adopted in dealing with the Commissioner's report. It was observed :

“It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient ground is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious

execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.”

The above is the position in law uninfluenced in any manner by the provisions of the Code of Civil Procedure.

19. The Supreme Court of India had occasion to consider the jurisdiction of the Courts in exercising the powers under Articles 32 and 226 of the Constitution of India in appointing Commissioners and the evidential value of such reports in such proceedings. The matter arose in a public interest litigation. In *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802, Bhagwati, J. at page 816 (paragraph 14) of the judgment stated thus :

“The report of the Commissioner would furnish prima facie evidence of the facts and data gathered by the Commissioner and that is why the Supreme Court is careful to appoint a responsible person as Commissioner to make an enquiry or investigation into the facts relating to the complaint. It is interesting to note that in the past the Supreme Court has appointed sometimes a district Magistrate, sometimes a district Judge, sometimes a professor of law, sometimes a journalist, sometimes an officer of the Court and sometimes an advocate practising in the Court, for the purpose of carrying out an inquiry or investigation and making report to the Court because the Commissioner appointed by the Court must be a responsible person who enjoys the confidence of the Court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice. Once the report of the Commissioner is received, copies of it would be supplied to the parties so that either party, if it wants to dispute any of the facts or data stated in the Report, may do so by filing an affidavit and the Court then consider the report of the Commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the Commissioner and to what extent to act upon such facts and data. But it would not be correct to say that the report of the Commissioner has no evidentiary value at all, since the statements made in it are not tested by cross-examination.”

At page 817 of the judgment, in paragraph 15, the learned Judge said thus :

“We may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Art. 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there

are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights.”

Pathak, J. in concurring the judgment, observed at page 845 (paragraph 70) thus :

“It is true that the reports of the said Commissioners have not been tested by cross-examination, but then the record does not show whether any attempt was made by the respondents to call them for cross-examination. The further question whether the appointment of the Commissioners falls within the terms of Order XLVI of the Supreme Court Rules, 1966 is of technical significance only, because there was inherent power in the Court, in the particular circumstances of this case to take that action.”

Amarendra Nath Sen, J. in a concurring judgment, at page 849 (paragraph 81) stated the law thus :

“The power to appoint a commission or an investigating body for making enquiries in terms of directions given by the Court must be considered to be implied and inherent in the power that the Court has under Article 32 for enforcement of the fundamental rights guaranteed under the Constitution. This is a power which is indeed incidental, or ancillary to the power which the Court is called upon to exercise in a proceeding under Art. 32 of the Constitution. It is entirely in the discretion of the Court, depending on the facts and circumstances of any case, to consider whether any such power regarding investigation has to be exercised or not. The Commission that the Court appoints or the investigation that the Court directs while dealing with a proceeding under Art. 32 of the Constitution is not a Commission or enquiry under the Code of Civil Procedure. Such power must necessarily be held to be implied within the very wide powers conferred on this Court under Art. 32 for enforcement of fundamental rights. I am, further of the opinion that for proper exercise of its powers under Art. 32 of the Constitution and for due discharge of the obligation and duty cast upon this Court in the matter of protection and enforcement of fundamental rights which the Constitution guarantees, it must be held that this Court has an inherent power to act in such a manner as will enable this Court to discharge its duties and obligations under Art. 32 of the Constitution properly and effectively in the larger interest of administration of justice, and for proper protection of constitutional safeguards. I am, therefore, of the opinion that this objection is devoid of any merit.”

The latest decision on this subject is *Delhi Judicial Service Association Tis Hazari Court v. State of Gujarat*, 1991 AIR SCW 2419 : (1991) 4 SCC 406. We are of the view that the above decisions establish that the Court, in exercising the powers under Article 226 of the Constitution of India, can appoint a Commission. The Commission so appointed by the Court must be responsible persons who enjoy the confidence of the Court and who are expected to carry out the assignment objectively and impartially without any predilection or prejudice. The report of the Commission should be served on all the parties or made known to the

public. If any person wants to dispute any of the fact or data stated in the report, he may take steps in that regard by filing an affidavit or by leading evidence. If the Commission so appointed by the Court to hold enquiry, considered facts and circumstances and made local inspection and discussed the matter with the parties and submitted a report containing reasoned findings, prima facie it constitutes evidence which can be acted by a Court of law. Interference with the result of a detailed and careful report so submitted should be made only for cogent and compelling reasons. In a case where an elaborate report is filed by the Commissioner, whose integrity, credibility and carefulness are not questioned, whose careful and laborious execution of his task is proved by the report itself, interference will be made only in exceptional circumstances, in cases where convincing evidence contra is available before Court."

13. (2003) 4 SCC 493 (*Sharda v. Dharmpal*) the Hon'ble Supreme Court has held that the primary duty of a Court is to see that truth is arrived at. Under Section 75(e) of the Code of Civil Procedure and Order XXVI Rule 10A of the Code of Civil Procedure, the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation. In certain cases scientific examination by the experts in the field may not only be found to be leading to the truth of the matter, but may also lead to removal of misunderstanding between the parties. Relying on said judgment, it is respectfully submitted that the ASI report is a scientific report of experts which has removed misunderstanding between the parties by giving scientific record that beneath the then existing disputed structure there was remains of temples of Northern Indian Hindu temples of 12th century over which the disputed structure was erected by utilizing material of the said temple. As such the said report is liable to be considered in the true letter and spirit of the aforesaid judgment of the Hon'ble Supreme Court. Relevant paragraph no.32-37 of the aforesaid judgment read as follows:

"32. Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the ~~1509~~ Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

33. Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.

34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.

35. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.

36. In matrimonial disputes, the court has also a conciliatory role to play — even for the said purpose it may require expert advice.

37. Under Section 75(e) of the Code of Civil Procedure and Order 26 Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.”

14. In 1995 Supp (4) SCC 600 (*Misrilal Ramratan v. A.S. Sheik Fathimal*) the Hon’ble Supreme Court held that it is settled law that the report of the Commissioner is part of the record and that therefore, the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as witness since it is part of the record. Relying on the said judgment, it is respectfully submitted that on the ground of non-examination of the archaeologists of the ASI team the said report cannot be overlooked and rejected and as in view of settled law, the said scientific report is part of the record. The report is liable to be considered for drawing of the inferences. Relevant paragraph no.3 of the aforesaid judgment reads as follows:

“**3.** Shri Sundaravaradan, learned Senior Counsel appearing for the appellants has contended that the approach of the High Court is manifestly illegal. We find no force in the contention. It is now settled law that the report of the Commissioner is part of the record and that therefore the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness since it is part of the record of the case. We have gone through the report submitted by Shri Sundaravaradan and the High Court is clearly right in its conclusion that the age of the building as per the sanctioned plan of 1928 is 70 years and the building requires demolition. In fact, it is undisputed that the landlord obtained sanction from the Municipal Corporation for demolition of the building. What was lacking thereafter was that he did not obtain sanction for reconstruction. This is one of the grounds for rejecting the application for eviction. Undertaking was given that within six months from the date of the construction, he would obtain necessary sanction. Under these circumstances, we find that the High Court is right in reaching the conclusion that the landlord has established the need for demolition of the building for reconstruction as envisaged under Section 14(1)(b) of the Act. The appeals are dismissed. However three months’ time is granted to the appellants for vacating the premises with usual undertaking. The undertaking shall be filed within one month from today.”

15. In (1988) 2 SCC 292 (*Southern Command M.E.S. Employees’ Cooperative Credit Society v. V.K.K. Nambiar*) the Hon’ble Supreme Court held that the High Court was obviously in error in its view that the Commissioner’s report could not be acted upon and be treated evidence. Relying on said judgment, it is submitted that as the Commissioner’s report is a legal evidence, it is liable to be considered by this Hon’ble Court as a piece of evidence. Relevant paragraph no.1 of the aforesaid judgment reads as follows:


“**1.** After hearing Learned Counsel for the parties, we are satisfied that interference by the High Court with the findings of fact recorded by the lower appellate court in exercise of its supervisory jurisdiction under Article 227 of the Constitution was wholly unwarranted and in excess

of its jurisdiction. The High Court was obviously in error in its view that the Commissioner's report could not be acted upon or be treated as legal evidence. The Commissioner's report tends to show that the demised premises are no longer in occupation of the respondent but in occupation of strangers which fact does raise an inference of subletting as held by the lower appellate court."


16. The main ground of the objection of the plaintiffs specifically the plaintiff no.1's objection dated 8th October, 2003 as contained in its paragraph no.1 that the ASI report has been prepared with a prejudice mind and with one-sided presentation of evidence. In other words it can be said that the ground is of biased and mala fide as it has been elucidated in supplementary objection of the defendant no.6/1 & 6/2 of the OOS no.3 of 1989 dated 03/11/2003 wherein in paragraph nos.1 and 6 it has been stated that the said report is meant to strengthen the design of the communal combine RSS, BJP, VHP. The ASI department is under the control of Central Government. At that time the then Prime Minister Shri Atal Behari Bajpayee, Deputy Prime Minister Sri L.K. Advani and HRD Minister Sri M.M. Joshi all were of the BJP as such the ASI excavation team acted under their instruction and behest. As such said report being biased and mala fide is liable to be rejected.
17. In 1992 Supp (1) 222 (*State of Bihar & Anr. v. P.P. Sharma, IAS & Anr.*) the Hon'ble Supreme Court held that mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. The determination of a plea of mala fide involves two questions namely, whether there is a personal bias or an oblique motive and whether the administrative action is contrary to the objects, requirements and conditions of valid exercise of power. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrative either by admitted or proved facts and circumstances obtainable in given case. Relying on said judgment it is submitted that the objectors failed to prove the mala fide either by admitted or proved facts and circumstances as such their objection is liable to be rejected. Relevant paragraph 50-52 of the said judgment read as follows:

"50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.


52. Public administration cannot be carried on in a spirit of judicial detachment. There is a very wide range of discretionary administrative acts not importing an implied duty to act judicially though the act must be done in good faith to which legal protection will be accorded. But the administrative act de hors judicial flavour does not entail compliance with the rule against interest and likelihood of bias. It is implicit that a complainant when he lodges a report to the Station House Officer  261 accusing a person of commission of an offence, often may be a person aggrieved, but rarely a pro bono publico. Therefore, inherent animosity is licit and by itself is not tended to cloud the veracity of the accusation suspected to have been committed, provided it is based on factual foundation."

18. In (2008) 7 SCC 639 (*H.V. Nirmala v. Karnataka State Financial Corporation*) the Hon'ble Supreme Court held that where a party did not raise any objection in regard to the appointment of the enquiry officer and participated in the enquiry proceeding without any demur whatsoever and failed to establish that any prejudice has been caused by reason of appointment of a legal advisor as an enquiry officer such party cannot be permitted to raise the said contention. Relying on said judgment it is submitted that the ASI was appointed to carry out the excavation work by this Hon'ble High Court and no objection was raised with regard to such appointment of ASI rather the objectors, their observers, their nominees and other parties duly participated in the excavation proceeding and they have also failed to establish that appointment of ASI caused any prejudice to them their such contention is liable to be rejected. Relevant paragraph 10 of the said judgment reads as follows:

"10. The appellant did not raise any objection in regard to the appointment of the enquiry officer. She participated in the enquiry proceeding without any demur whatsoever. A large number of witnesses were examined before the  644 enquiry officer. They were cross-examined. The appellant examined witnesses on her own behalf. The learned Single Judge as also the Division Bench of the High Court opined that the appellant has failed to establish that any prejudice has been caused to her by reason of appointment of a legal advisor as an enquiry officer and as the appellant has participated in the enquiry proceeding, she could not be permitted to raise the said contention."

19. In (2006) 3 SCC 56 (*Ceat Ltd. v. Anand Abasaheb Hawaldar & Ors.*) the Hon'ble Supreme Court held that in order to establish favouritism or partiality mental element of bias must be established by cogent evidence. Relying on said judgment it is submitted that the objectors have failed to establish mental element of bias of the members of the ASI excavation team as such their

objection is liable to be rejected. Relevant paragraph 11 to 16 of the said judgment read as follows:

“11. In Item 5 of Schedule IV to the Act, the legislature has consciously used the words “favouritism or partiality to one set of workers” and not differential treatment. Thus, the mental element of bias was necessary to be established by cogent evidence. No evidence in that regard was led. On the contrary the approach of the Industrial Court and the High Court was different. One proceeded on the basis of breach of assurance and the other on the ground of discrimination. There was no evidence brought on as regards the prerequisite i.e. favouritism or partiality. Favouritism means showing favour in the matter of selection on circumstances other than merit. (Per *Advanced Law Lexicon* by P. Ramanatha Aiyar, 3rd Edn., 2005.) The expression “favouritism” means partiality, bias. Partiality means inclination  61 to favour a particular person or thing. Similarly, it has been sometimes equated with capricious, not guided by steady judgment, intent or purpose. Favouritism as per *Webster’s’ Encyclopaedic Unabridged Dictionary of the English Language* means the favouring of one person or group over others having equal claims. Partiality is the state or character of being partial, favourable, biased or prejudiced.

12. According to *Oxford English Dictionary*, “favouritism” means—a deposition to show, or the practice of showing favour or partiality to an individual or class, to the neglect of others having equal or superior claims; under preference. Similarly, “partiality” means the quality or character of being partial, unequal state of judgment and favour of one above the other, without just reason. Prejudicial or undue favouring of one person or party or one side of a question; prejudice, unfairness, bias.

13. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially:

“If however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices.” (Per Frank, J. in *Linahan, Re*¹, F 2d at p. 652.)

14. It is not every kind of differential treatment which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest — whether pecuniary or personal.

15. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by

establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.

16. As we have noted, every preference does not vitiate an action. If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. The above position was highlighted in *G.N. Nayak v. Goa University*².”

20. In (2005) 5 SCC 363 (*People's Union for Civil Liberties v. Union of India*) the Hon'ble Supreme Court held that public displeasure is not confined to the police force only but this displeasure is reflected against many a department of the government including constitutional bodies and if public displeasure or perception were to be the yardstick to exclude people from holding constitutional or statutory offices then many such posts in the country may have to be kept vacant. Relying on said judgment it is submitted that as at that time there was BJP government, it cannot be said that all the branches and department of the government were working dishonestly at the behest of the BJP government. As such the objection which is based on such hypothetical wild allegations is liable to be rejected. Relevant paragraph nos.10 to 12 of the said judgment read as follows:

“10. While we cannot take exception in regard to the remarks made against the police in each one of the above cases relied on by the learned counsel for the petitioner, we certainly feel that these remarks cannot be so generalised as to make every personnel of the force, consisting of nearly 2.2 million people, violators of human rights solely on the ground that out of thousands of cases investigated and handled by them, in some cases the personnel involved have indulged in violation of human rights. Learned counsel for the petitioner, however, contended that the judgments apart, the public perception of the Indian police force as a whole is so poor that it considers the police as an organisation to be a violator of human rights. Therefore, selecting a retired police officer as a member of the Commission would lead to erosion of confidence of the people in the Commission. We are sincerely unable to gauge this public perception or its magnitude so as to import this concept of institutional bias. There are no statistics placed before ~~the~~³⁷⁰ this Court to show that there has been any census or poll conducted which would indicate that a substantial majority of the population in the country considers the police force as an institution which violates human rights nor do we think that by such generalisations we could disqualify a person who is otherwise eligible from becoming a member of the Commission.

11. Public displeasure as presently perceived is not confined to the police force only. The views expressed in the media very often show that this displeasure is reflected against many a department of the Government including constitutional bodies and if public displeasure or perception were to be the yardstick to exclude people from holding constitutional or statutory offices then many such posts in the country may have to be kept vacant.

12. Then again what is the yardstick to measure public perception. Admittedly, there is no barometer to gauge the perception of the people. In a democracy there are many people who get elected by a thumping majority to high legislative offices. Many a times public perception of a class of society in regard to such people may be that they are not desirable to hold such post but can such a public opinion deprive such people from occupying constitutional or statutory offices without there being a law to the contrary? There is vast qualitative difference between public prejudice and judicial condemnation of an institution based on public perception. At any rate, as stated above, public perception or public opinion has no role to play in selection of an otherwise eligible person from becoming a member of the Commission under the Act."

21. In (2001) 1 SCC 182 (*Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*) the Hon'ble Supreme Court held that the word 'bias' include the attributes and broader purview of the word 'malice' which means and implies 'spite' or 'ill-will' and it is now well-settled that mere general statement will not be sufficient for the purposes of indication of ill-will, there must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in miscarriage of justice. Relying on said judgment it is submitted that the objectors have failed to establish ill-will by cogent evidence as such their objection is liable to be rejected. Relevant paragraph no.10, 26 & 32-35 read as follow:

"10. The word "bias" in popular English parlance stands included within the attributes and broader purview of the word "malice", which in common acceptance means and implies "spite" or "ill-will" (*Stroud's Judicial Dictionary*, 5th Edn., Vol. 3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice.

26. "Bias" in common English parlance means and implies — predisposition or prejudice. The Managing Director admittedly, was not well disposed of towards the respondent herein by reason wherefor, the respondent was denuded of the financial power as also the administrative management of the department. It is the selfsame Managing Director who levels thirteen charges against the respondent and is the person who appoints the enquiry officer, but affords a pretended hearing himself late in the afternoon on 26-11-1993 and communicates the order of termination consisting of eighteen pages by early evening, the chain is complete: prejudice apparent: bias as stated stands proved.

32. Lord Hutton also in *Pinochet case*¹⁶ observed:

"There could be cases where the interest of the Judge in the subject-matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation."

33. Incidentally in *Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.]*¹⁷ the Court of Appeal upon a detail analysis of the oft-cited decision in *R. v. Gough*¹⁸ together with the *Dimes case*¹⁹, *Pinochet case*¹⁶, Australian High Court's decision in the case of *J.R.L., ex p C.J.L., Re*²⁰ as also the Federal Court in *Ebner, Re*²¹ and on the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union*²² stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:

"By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakuta v. Kelly*²³); or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, ~~his~~²⁰¹ prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

34. The Court of Appeal judgment in *Locabail*¹⁷ though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case — a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient.

35. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the

surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom — in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in *Locabail case*¹⁷.”

22. In (2001) 2 SCC 330 (*State of Punjab v. V.K.Khanna*) the Hon'ble Supreme Court held that the test is as to whether there is a mere apprehension or there is a real danger of bias and it is on this score that on the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. If allegations pertain rather fanciful apprehension in administrative action question of declaring them to be unsustainable on the basis therefore would not arise. Action not bona fide by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act. Relying on said judgment, it is submitted that the objectors have failed to prove and establish the aforesaid ingredients of prejudice and mala fide as such their objections are liable to be rejected. Relevant paragraph no.8 and 25 of the said judgment read as follows:

“5. Whereas fairness is synonymous with reasonableness — bias stands included within the attributes and broader purview of the word “malice” which in common acceptation means and implies “spite” or “ill will”. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice (see in this context *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant*¹). In almost all legal inquiries, “intention as distinguished from motive is the all-important factor” and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. In the case of *Jones Bros. (Hunstanton) Ltd. v. Stevens*² the Court of Appeal has stated upon reliance on the decision of *Lumley v. Gye*³ as below:

“For this purpose maliciously means no more than knowingly. This was distinctly laid down in *Lumley v. Gye*³ where Crompton, J. said that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of service, commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse: *Bromage v. Prosser*⁴. ‘Intentionally’ refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as for

instance to rebut a plea of privilege in defamation, malice in fact has to be proved.”

6. In *Girja Shankar Pant* case¹ this Court having regard to the changing structure of the society stated that the modernisation of the society with the passage of time, has its due impact on the concept of bias as well. Tracing the test of real likelihood and reasonable suspicion, reliance was placed in the decision in the case of *Parthasarathi* (*S. Parthasarathi v. State of A.P.*⁵) wherein Mathew, J. observed: (SCC pp. 465 - 66, para 16)

“16. The tests of ‘real likelihood’ and ‘reasonable suspicion’ are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right-minded persons would think that there ~~is~~^{is} real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*⁶ (WLR at p. 707)]. We should not, however, be understood to deny that the court might with greater propriety apply the ‘reasonable suspicion’ test in criminal or in proceedings analogous to criminal proceedings.”

7. Incidentally, Lord Thankerton in *Franklin v. Minister of Town and Country Planning*⁷ opined that the word “bias” is to denote a departure from the standing of even-handed justice. *Girja Shankar* case¹ further noted the different note sounded by the English Courts in the manner following: (SCC pp. 199-201, paras 30-34)

“30. Recently however, the English courts have sounded a different note, though may not be substantial but the automatic disqualification theory rule stands to some extent diluted. The affirmation of this dilution however is dependent upon the facts and circumstances of the matter in issue. The House of Lords in the case of *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No. 2)⁸ observed:

‘... In civil litigation the matters in issue will normally have an economic impact; therefore a Judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a Judge applies just as much if the Judge’s decision will lead to the promotion of a cause in which the Judge is involved together with one of the parties.’

31. Lord Brown-Wilkinson at p. 136 of the report stated:

'It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25-11-1998 would lead to a position where Judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a Judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular ~~the~~^{the}338 result; (3) the Judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a Judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a Judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the Judge would be well advised to disclose a possible interest.'

32. Lord Hutton also in *Pinochet case*⁸ observed:

'There could be cases where the interest of the Judge in the subject-matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.'

33. Incidentally in *Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.]*⁹ the Court of Appeal upon a detail analysis of the oft-cited decision in *R. v. Gough*¹⁰ together with the *Dimes case*¹¹, *Pinochet case*⁸, Australian High Court's decision in the case of *J.R.L., ex p C.J.L., Re*¹² as also the Federal Court in *Ebner, Re*¹³ and on the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union*¹⁴ stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:

'By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in ~~the~~^{the}339 such extreme and unbalanced terms as to throw doubt on his ability to try the issue with

an objective judicial mind (see *Vakuta v. Kelly*¹⁵); or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.'

34. The Court of Appeal judgment in *Locabail*⁹ though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case — a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient."

8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor, would not arise.

9. It is in the same vein this Court termed it as reasonable likelihood of bias in *Rattan Lal Sharma case* (*Rattan Lal Sharma v. Managing Committee Dr Hari Ram (Co-Education) Higher Secondary School*¹⁶ wherein this Court was pleased to observe that the test is real likelihood of bias even if such bias was, in fact, the direct cause. In *Rattan Lal Sharma case*¹⁶ real likelihood of bias has been attributed a meaning to the effect that there must be at least a substantial possibility of bias in order to render an administrative action invalid. *Rattan Lal Sharma case*¹⁶ thus, in fact, has not expressed any opinion which runs counter to that in *Girja Shankar case*¹ and the decision in the last-noted case thus follows the earlier judgment in *Rattan Lal case*¹⁶ even though not specifically noticed therein.

340 10. Before advertng to the rival contentions as raised in the matter, it would also be convenient to note the other perspective of the issue of bias to wit: mala fides. It is trite knowledge that bias is included within the attributes and broader purview of the word "malice".

23. The conclusion of the ASI report submitted before this Hon'ble Court is that there was a temple. In Chapter VI of the said report Sri L.S. Rao, Sri A.R. Siddiqui and Sri Sujeet Narayan, the archaeologists record their inferences as follows:

"A noteworthy aspect of some of these architectural members is the presence of mortises/open grooves of varying dimensions on the body of slabs which serve the purpose of providing dowels/clamps as binding factor. In many a cases iron dowels have been found *in situ*. Besides, there are also symptomatic features to the effect of reusing the earlier architectural members with decorative motifs or mouldings by re-chiseling the slab (Pls.79-80, Fig.59). A few intact architectural members like Amlaka (Pl.81, Fig.59) pillar with *Ghata-pallava* base with dwarf beings as weight-bearers and *Kirtimukhas* (Pls.82-83, Fig.59) to mention a few, have also been recovered. Besides, there are a member of architectural members which have been decorated with deeply carved foliage motifs. This pattern is a distinct one resembling like that of "stencil" work (Pls.86-87). It may be pointed out that the various architectural members with similar decorative designs have been found used in the foundation of one of the major brick structures (wall 16) (see Chapter-IV-Structure) exposed in these excavations.

The aforesaid pillars and other decorative architectural members of this site like fragment of broken jamb with semi circular pilaster (Pl.85), fragment of lotus medallion motif (Pls.89-90) emphatically speak about their association with the temple architecture. Stylistically, these architectural members in general and pillars in particular may be placed in a time bracket of tenth-twelfth Century A.D. It is also pertinent to note that there are a few architectural members (Pls.92-94), which can clearly be associated with the Islamic architecture on stylistic ground, which might belong to sixteenth century A.D. onwards."

(ASI report vol.I p.121 - 122)

24. The the ASI report submitted before this Hon'ble Court in its Chapter-IV Sri B.R. Mani, Sri D.K. Singh, Sri Bhuvan Vikrama, Sri Gajanan L. Katade, Sm. Prabash Sahu and Sri Zulfeqar Ali the archaeologists record their inferences as follows:

a) "Two decorated sand stone blocks from an earlier structure, one having the damaged figure of a possible foliated *makara-prāṇala* were found re-used in the foundation of wal 5 on its outer face (Pls.22-23)"

(ASI report, Ch.IV Vol.I p.52)

b) "The decorated octagonal sand stone block on pillar base 32 having floral motif on four corners in trench F7 in the southern area is the unique example at the site (Pl.39) which definitely belongs to the 12th century AD. as it is similar to those found in the *Dharmachakrajijna Vihara* of Kumaradevi at Sarnath (Pl.40) which belongs to the early 12th century AD."

(ASI report, Ch.IV, Vol.I p.56)

c) "A partly damaged east facing brick shrine, structure 5 (Pls.59-60, Fig.17, 24 & 24A) was noticed after removal of baulk between trenches

E8 and F8. It is a circular structure with a rectangular projection in the east ...

Thus on stylistic grounds, the present circular shrine can be dated to c. tenth century A.D. when the Kalachuris moved in this area and settled across river Sarayu. They possibly brought the tradition of stone circular temples transformed into brick in Ganga-Yamuna valley."

(ASI Report, Ch. IV Vol. I, p.70 & 71)

"The Ram Chabutra

The excavation revealed that the *Ram Chabutra* or structure 1 (Fig.3) has got no less than five different structural phases of its construction (Pl.15). Its original use is not certain and there is possibility of its being a water tank in its original shape. The chabutra which looked a small platform in its final form at the time of its last use, was found to be a fairly large structure when its core was exposed besides outer phases wherever where possible for excavation. In its enlarged form it was a structure nearly 22 m in east-west and about 14m in north-south orientation.

The base of the structure has been found to be no less than 2.67 m deep, constructed of 7 levels, each having calcrete blocks in one course with joints filled up with lime-surkhi mortar. These courses of the foundation levels were found still continuing downwards. Above this base was constructed a tank like structure of eight levels (Pl.16) having in its each level one course of calcrete blocks topped by two courses of bricks set in lime mortar. Above each-level the walls were plastered with lime mortar. In its original form it had perhaps four projections in the middle of its four walls, but later it was raised upon the height of 2.41 m having eight levels in all and a projection of 76 m with the length of 1.67 m on its eastern and western sides in the middle of the wall. The inner measurements of this structure are 4.08 m in north-south and 4.30 m in east-west directions without their projection on either sides of east and west.

In the third stage of its use the structure was filled up with debris consisting of calcrete blocks and brick-bats upto its surface level. Afterwards throughout on the surface a course of calcrete blocks was spread with brick-bats mixed with lime-surkhi mortar above which was placed a squarish masonry platform at the spot where the western projection of the structure was located (Pl./17).

The squarish masonry platform was a solid structure 40 cm in height and 1.50 m in east-west and 1.55 m in north-south direction with its 7 cm top plastered cleanly with fine lime mortar. The top part was found projected over the surface (Pl,18) below which one more course of calcrete blocks and brick-bats etc., as in the lower course below it, were found laid and set in lime-surkhi mortar. Thus the total height raised over the tank like structure was 75 cm. This seems to have been the earliest form of the *Ram Chabutra* seems to match with the description of a square box elevated 5 inches above the ground level covered with lime stone or vedi (bedi) which was circumambulated

thrice and saluted by people by prostrating on ground as given by the Austrian traveller Joseph Tieffenthaler who visited the site around 1766-71 and whose account was published in Latin and translated in French in 1786 under the title *Description historique et géographique de l' Inde*.

It is quite apparent that in due course of time the height of the *Ram chabutra* was further raised in two phases first having three levels of calcrete blocks mixed with brick-bats, terracotta objects and potsherds of earlier period set in like-surkhi mortar, each level divided by well plastered surface. Finally, on the top, four courses of lakhauri bricks, brick-bats of earlier bricks set in like-surkhi mortar, were laid, probably during the late Mughal period over which cement plaster was done at a later date in which were fixed memorial or decorative slabs as evident from the impressions available over the plaster (Pl.19). thus the minimum height of the structure was found to be no less than 7.40 m. In the extended part of the *Ram Chabutra* in the west its retaining wall has damaged the pillar bases 30, 33, 36, 39 and 42 of the Period VII. (Fig.3B)"

(ASI report, vol.I, p.49 – 51)

d) During the excavation 62 human and 131 animal figurines were found. In the consonance with the prevailing practice in the Gangetic valley, these figurines are the products of both handmade as well as moulding techniques. These terracottas are assignable from the pre-Mauryan to the previous century. They are both religious as well as secular, the former being represented as cult objects viz. mother-goddess.

(ASI report, vol.I, Ch. VII p.174)

25. The said ASI report records its findings of temple as follows:

"The Hon'ble High Court, in order to get sufficient archaeological evidence on the issue involved "whether there was any temple/structure which was demolished and mosque was constructed on the disputed site" as stated on page 1 and further on p.5 of their order dated 5 march, 2003 had given directions to the Archaeological Survey of India to excavate at the disputed site where the GPR Survey has suggested evidence of anomalies which could be structure, pillars, foundation walls, slab flooring etc. which could be confirmed by excavation. Now, viewing in totality and taking into account the archaeological evidence of massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patterns, *amalaka*, *kapotapali* doorjamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having *pranala* (waterchute) in the north, fifty pillar bases in association of the huge structure, are indicative of remains which are distinctive features found associated with the temples of north India."

26. The Gazetteer of India, Vol.-II, 3rd Edn. 1990, published by Director Publications Division, Govt. of India, Delhi also records that *amalaka* is characteristic feature of north Indian i.e. Nagara style temples. Relevant extracts from the said gazetteer reads as follows:

"The three lower ones are square in cross section while the mastaka, of which the topmost part is the *amalaka*, is circular. Each of these sections has further subdivisions of which those of the *bada* may be useful for a study of the evolutionary sequence."

(Ibid. P.224)

"...In the Brahmesvara the *jagamohana* roof is surmounted by a domical member with the *amalaka* as its crown."

(Ibid. P.225)

"...Another typical feature is supplied by *amalakas* forming the crowning member of the principal *sikhara* and of the *anga-sikharas*."

(Ibid. P.227)

"...in a few instances, of such Central Indian features as extensions of *pagas* double *amalaka*."

(Ibid. P.229)

"...Such temples bear the characteristic features of the early *Nagara* temple, though the attenuated and globular shape of the *amalaka* provides a significant divergence."

(Ibid. P.231)

27. Mohammad Abid, as an expert witness deposed in Hindi as DW 6/1-2 relevant portions of his deposition reads as follows:

"a). I am well acquainted with the standard, technique as well as scientific and practical system and procedure of the archaeological excavation.

(ibid P. 2 – 3 para 3 specially line 5 and 6 of p. 3).

b). Pillar base as it is seen in Plate 48 exactly same pillar base was found and no addition or alteration was made to it.

(ibid p.25 L.10-12)

c). In Ayodhya at the time of excavation scientific method was adopted.

(ibid p.57 L. 8-9)

d). It is correct that amongst the artefacts found in excavation, a divine couple was also found.

(ibid p.65 L. 1-2)

e). It is correct that Toran – Ganapati, Prakar Mandir and yantra are found in a temple but not in a mosque.

(ibid p.65 L.11-16)

28. Professor Dhaneshwar Mandal, as an expert witness deposed in Hindi as PW -24 relevant portions of his deposition read as follows:

"a). I don't think that during my stay archaeologists had constructed any pillar etc. In my presence there was no such happening that said archaeologist manufactured anything in concealed manner or by force.

During excavation I had seen that the artefacts found in course of excavation were segregated. This is also correct to say that during the excavation human deposits were being found from the trenches.

(ibid p. 161 L.5-9)

b). If at any place there is a kitchen then naturally at that place food would have been prepared but if really food would have been prepared, then according to archaeology finding of furnace / oven from that place is essential. In the collection of ASI's report Volume II (Plates) in Plate No. 3 oven and furnace have been shown and I myself has also seen the oven and furnace on excavation-site.

(ibid p. 191 L. 9-15)

c). In the Plate no.39 it looks as a stylistic elephant's trunk

(Ibid p.250 L.6 & 7)

d). In Plate no.37 of the aforesaid report one pillar base of a definite form is appearing, There are stones on both side to support it. There is no such construction in Plate no.42. In this Plate the visible upper portion on which is marked F2 construction thereof is like the construction which is seen in aforesaid Plate no.37 & 38. The pillar-base which is visible in Plate no.47 construction thereof is different from the pillar-base of the aforesaid Plates. The pillar-base which is visible in Plate no.44 construction whereof is also different from the aforesaid pillar-bases. The pillar-base which is visible in Plate no.45, construction thereof is different from the construction of the pillar-bases which are visible in Plate no.37 & 38. The pillar-base which is in Plate no.46, construction thereof is different from the aforesaid pillar-bases. The construction of the pillar-base visible in Plate no.46 is similar to the construction in Plate no.42. The construction of the pillar-base visible in Plate no.47 is similar to the construction of the pillar-bases visible in Plate no.42 & 46. In Plate no.48 pillar-base of circular type is visible.

(Ibid p.262 L.2-17)

e). It is correct to say that floral motif is mostly used in Hindu temples. In Plate no.62 brick wall is visible beneath which in foundation some decorated stone pieces are connected. These stone pieces are also re-used. Floral motifs are also carved thereon. Mostly the floral motif are made in Hindu temples. The pillar-base which is visible in Plate no.30 is similar to the pillar-bases which are visible in Plate no.42 & 46. In the Plate no.22 a figure made on a stone-slab is *Maker Pranal*. In the Plate no.23 its close up has been given. *Makar* are abundantly made in Hindu temples. The stones whereon flower, leaf, animal figurines, *Kalash* are engraved those are used in Hindu temples but it can be brought from somewhere else also and they might be of that place were they are entangled. Thus there are both possibilities.

(Ibid p.263 L.5 - 16)

f). Such pillar-bases has also been found wherein orthostate has been used. Mainly these are situated in the Northern direction of the make-shift-structure. Such orthostatic pillar-base has not been found in the South. The orthostatic pillar-bases which have been found in the

North wards of the make-shift-structure, I recognize them pillar-bases. I cannot say how many pillar-bases are on the North wards and how many pillar-bases are on South wards but the number of orthostate pillar-bases is 11. (I) recognize orthostatic pillar-bases as load bearing pillar-base but possibly their date is of post Mughal period. If in any pillar-base its foundation is of brick-bats and above which is orthostat, then I will recognize such pillar-base as load bearing pillar-base. In the Northern direction few pillar-base have been found. Such pillar-base have been found in the North the foundation whereof or brick bats and above that orthostate have been found.

(*Ibid* p.288 L.16 – 24 and p.289 L.1 – 4)

g). During the excavation at disputed site in Ajodhya small idols have been found.

(*Ibid* p.310 L.11 – 12)

h). In this Plate (Plate no.129 of ASI's report volume 2) Cobra-hood is visible.

(*Ibid* p.310 L.16 & 17).

i) I have earlier also seen the Plate no.235 (of volume no.2 of ASI report). In a figure of this Plate which is on left-side portion of waist is visible wherein some article like ornament is visible but looking it, it cannot be said that whether this figure is of male or female.

(*Ibid* p.320 Last line and p.321 L.1 – 4).

29. In the ASI's report Vol.II Plate 67 is photograph of "Garud-dhwaj" Plate No. 88 is photograph of "Srivatsa". These religious symbols of the Hindu Temple have been found during excavation at disputed site in Ayodhya. In Sri Bhagawat-Puran. 1.18.16; Sri Mahabharat | Anushasan Parva.149. 51 & Shanti-parva Garud-dhwaj have been mentioned as one of the thousand names of the Lord of Universe Sri Vishnu which means in the Flag of Lord Vishnu emblem of Garud finds place. In Sri Valmiki Ramayana | Yuddh-Kanda.111.13 & 132; Sri Mahabharat | Anushasan Parva.149.77; Sri Ramcharitamanas | Balkanda.146.6 Sri Vatsa has been mentioned as a holy mark on the chest of the Lord of Universe Sri Vishnu. Finding of these holy religious symbols related to the Lord of Universe Sri Vishnu leaves no doubt that the structure in question was a Vaishnav Temple.
30. In the ASI's report Vol.1 a chart of the Architectural Members have been given on pages 122-152 wherein on Sl. No.130 at page 129 Ghata Pallava & Srivatsa; on Sl. No.148 at page 130 Divine Couple in alingana mudra; on Sl. No.123 at page 140 Couching Ganas(human beings) & Kirtimukhas; on Sl. No.125 at page 141 Amalaka; on Sl. No.225 at page 148 ghata-pallav, kirtimukhas, human miniature details have been given. ... In the said ASI's report Vol.1 a chart of the Miscellaneous Objects have been given wherein on pages 219-267 on sl. No.58 at page 252 *Swastika* have been described.
31. In the book 'A Dictionary of Hindu Architecture' by Prasanna Kumar Acharya published by Low Price Publication first published in 1934 and reprint in 2008 on page nos.17 to 43 *Adhishtana* have been described in detail. On its page no.109 and 110 *Kapota* and *Kapota-Pallika* have been defined. On its page nos.121 to 124 *kalas* has been defined, on its page no.246 *Torana*, has been

defined. On its page no.361 *Pranal* has been defined, *Prasad* has been described on page no.396. On its page no.598 *Sri-vatsa* have been described and defined. On its page nos.644 to 704 *Stambha* i.e. pillars/orthostate has been described and defined. On page nos.732 and 738 *Svastika* has been described and defined. From the aforesaid objects found during the excavation and their association with the temples as it is proved by the authentic dictionary and books of the Hindu architecture as well as Gazetteer of India makes it beyond doubt that the disputed structure was a temple.

32. The Commissioner in his report filed in Suit No. 1 of 1989 in the year 1950 has reported the presence of *Samadhis* of the Sages namely Sri Angira, Sri Markendey, Sri Sanak, Sri Sanandan and Sri Sanat attached to the disputed Structure of Sri Ramajanamasthan. As all four types of disposal of bodies i.e. cremating, drowning, burying and setting up (on hills etc.) have been described in the Divine Holy Sri Atharv-ved (18.2.34; 18.2.50-52 and 18.4.66). According to The Hindus' tradition and law the bodies of the Saints are either buried in earth which is known as *Khanans / Samadhi* or scattered in water which is known as *Jal-samadhi*. the Divine Holy Sri Atharv-ved (18.2.34) and its translation in Hindi and English read s as follows:

ये निखाता ये परोप्ता ये दग्धा ये चोद्धिताः ।

सर्वास्तानग्न आ वह पितृन् हविषे अत्तवे ॥३४॥

(अग्ने) हे अग्नि ! (ये निखाताः) जो पितर जमीन में गाड़े गए हैं और (ये परोप्ता) जो पितर दूर बहा दिए गए हैं तथा (ये दग्धा) जो जला दिए गए हैं (च) और (ये उद्धिताः) जो पितर जमीन के ऊपर हवा में रखे गए हैं (तान् सर्वान्) उन सब पितरों को तू (हविषे अत्तवे) हवि भक्षणार्थ (आ वह) ले जा ॥ ३४ ॥

34. They that are buried, and they that are scattered (*vap*) away, they that are burned and they that are set up (*uddhita*) — all those Fathers, O Agni, bring thou to eat the oblation.

33. Be it mentioned herein that offering flesh to manes and to the gods and goddesses in altar and taking flesh sanctified by Vedic hymns was religious practices of Hindus which is evident from Sri Manusmrity Discourse III.266-275 and Discourse V.26-44. Manes are worshiped in the form of the Lord of Universe Sri Vishnu and the Scriptures prescribe offering of various meat to "*Pitri roop Janardanah*". Even nowadays sacrifices are done in certain temples. The Lords of Ram Himself used to hunt in course whereof he was deceived by Marich who was in disguise of golden deer. Saints, cows, parrots etc. attached to a temple are buried in temple compound. As such bone can be found only at Hindu Shrine not at Mosque because building mosque over bones is strictly prohibited.
34. In temple cooking is must to feed the deity while it is prohibited in mosque. As during excavation oven and furnace have been found which are self evident of its being a temple.
35. AIR 1958 SUPREME COURT 731 "Mohd. Hanif Quareshi v. State of Bihar" held that the animals were used for the purpose of Sacrifices by the Hindus. In the ASI Excavation at disputed sites the bones have been found in and from the layer of the Gupta's period when the Islam had not come into existence from which fact it is crystal clear that the user of the flesh of those creatures

if any were not the Muslims. Non-application of chemical examination of the bones will not vitiate report as this Hon'ble Court's direction was to excavate the site attesting the statement of GPR Survey the exact nature of anomalies/objects by systematic truthing such as provided by archaeological trench and to ascertain that fact chemical examination of the bones was not essential. Relevant paragraph 22 of the said judgment reads as follows:

"22. The avowed object of each of the impugned Acts is to ensure the preservation, protection, and improvement of the cow and her progeny. This solicitude arises out of the appreciation of the usefulness of cattle in a predominantly agricultural society, Early Aryans recognised its importance as one of the most indispensable adjuncts of agriculture. It would appear that in Vedic times animal flesh formed the staple food of the people. This is attributable to the fact that the climate in that distant past was extremely cold and the Vedic Aryans had been a pastoral people before they settled down as agriculturists. In Rg. Vedic times goats, sheep, cows, buffaloes and even horses were slaughtered for food and for religious sacrifice and their flesh used to be offered to the Gods. Agni is called the "eater of ox or cow" in Rg. Veda (VIII. 43, 11). The slaying of a great ox (Mahoksa) or a "grate goat" (Maharaja) for the entertainment of a distinguished guest has been enjoined in the Satapatha Brahmana (III. 4. 1-2). Yagnavalkya also expresses a similar view (Vaj. 1. 109). An interesting account of those early days will be found in Rg. Vedic Culture by Dr. A. C. Dass, Chapter 5, pages 203-5 and in the History of Dharmasastras (Vol. II, Part II) by P. V. Kane at pages 772-773. Though the custom of slaughtering of cows and bulls prevailed during the Vedic period, nevertheless, even in the Rg. Vedic times there seems to have grown up a revulsion of feeling against the custom. The cow gradually came to acquire a special sanctity and was called "Aghnya" (not to be slain). There was a school of thinkers amongst the Risis, who set their face against the custom of killing much useful animals as the cow and the bull. High praise was bestowed on the cow as will appear from the following verses from Rg. Veda, Book VI, Hymn XXVIII (Cows) attributed to the authorship of Sage Bhardvaja:

"1. The kine have come and brought good fortune; let them rest in the cow-pen and be happy near us.

Here let them stay prolific, many coloured, and yield through many morns their milk for Indira.

6. O Cows, ye fattene'ene the worn and wasted, and make the unlovely beautiful to look on.

Prosper my house, ye with auspicious voices, your power is glorified in our assemblies.

7. Crop goodly pasturages and be prolific; drink pure sweet water at good drinking places.

Never be thief or sinful man your master, and may the dart of Rudra still avoid you."

(Translation by Ralph Griffith). Verse 29 of hymn 1 in Book X of Atharva Veda forbids cow slaughter in the following words:

"29. The slaughter of an innocent, O Kritya, is an awful deed, Slay not cow, horse, or man of ours."

Hymn 10 in the same Book is a rapturous glorification of the cow:

"30. The cow is Heaven, the cow is Earth, the cow is Vishnu, Lord of life.

The Sadhyas and the Vasus have drunk the outpourings of the cow.

34. Both Gods and mortal men depend for life and being on the cow.

She hath become this universe; all that the sun surveys is she."

P. V. Kane argues that in the times of the Rg. Veda only barren cows, if at all, were killed for sacrifice or meat and cows yielding milk were held to be not fit for being killed. It is only in this way, according to him that one can explain and reconcile the apparent conflict between the custom of killing cows for food and the high praised bestowed on the cow in Rg. Vedic times. It would appear that the protest raised against the slaughter of cows greatly increased in volume till the custom was totally abolished in a later age. The change of climate perhaps also make the use of beef as food unnecessary and even injurious to health. Gradually cows became indicative of the wealth of the owner. The Neolithic Aryans not having been acquainted with metals, there were no coins in current use in the earlier stages of their civilisation, but as they were eminently a pastoral people almost every family possessed a sufficient number of cattle and some of them exchanged them for the necessities of their life. The value of cattle (Pasu) was, therefore, very great with the early Rg. Vedic Aryans. The ancient Romans also used the word pecus or pecy (Pasu) in the sense of wealth or money. The English words, "pecuniary" and "impecunious", are derived from the Latin root pecus or pecu, originally meaning cattle. The possession of cattle in those days denoted wealth and a man was considered rich or poor according to the large or small number of cattle that he owned. In the Ramayana King Janaka's wealth was described by reference to the large number of herds that he owned. It appears that the cow was gradually raised to the status of divinity. Kautilya's Arthashastra has a special chapter (Ch. XXIX) dealing with the: "superintendent of cows" and the duties of the owner of cows are also referred to in Ch. XI of Hindu Law in its sources by Ganga Nath Jha. There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions."

PART-XXXIV

AS THE DISPUTED LAND IS RECORDED AS NAZUL LAND AND THE PLAINTIFFS HAVE FAILED TO PRODUCE ANY REGD. LEASE DEED THEY CANNOT CLAIM ANY RELIEF BASED ON TITLE:

1. Oudh was annexed on 13th February, 1856 before the summary settlement could be completed, mutiny broke out in Lucknow on 30th May, 1857, and the authority of the British Government came to a standstill, the entire records so far prepared were destroyed. After the furies of the mutiny were over and the British Government was able to re-control the Province, Lord Canning, issued a proclamation on 15th March, 1859, confiscating all proprietary rights in the soil of the Province.
2. The disputed land has been recorded as Nazul land which term has been elaborately dealt with in (1998) 1 UPLBEC 114 (*Satya Narain Kapoor v. State of U.p. & Ors.*) by the Hon'ble High Court Allahabad and which has been appreciated by the Hon'ble Supreme Court of India in (2004) 8 SCC 630 (*State of U.P. v. Satya Narain Kapoor*). In the abovementioned judgment the Hon'ble Allahabad High Court has held that the making of grants on lands which are possessed by the State is guided by the Government Grants Act, 1895. Relevant paragraph 36 of the said judgment reads as follows:

“36. For this purpose the meaning of nazul needs to be understood. What does nazul means as a concept? The making of grants on lands which are possessed by the State, whether the Union or the Provincial Government or even the Railway administration is guided by a legislation originally known as the Crown Grants Act, 1895, subsequently, the nomenclature was changed to be known as Government Grants Act, 1895. This is originally a central legislation. It has been applicable to this State when it was known as North Western provinces, Late United Provinces and today as Uttar Pradesh. It is also applicable with the amendment so made by the State legislature from time to time.”

3. Section 2 of the Government Grants Act, 1895 says that Transfer of Property Act, 1882 will not apply to the government grants. The said Section 2 as reproduced in paragraph 37 of *Satya Narain Kapoor v. State of U.P. & Ors.* (*supra*) reads as follows:

2.”Transfer of Property Act, 1882 not to apply to Government Grants.—Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made (by or on behalf of the Government) to, or in favour of, any person whomsoever, but every such grant and transfer shall be constructed and take effect as if the said Act had not been passed.”

4. In AIR 1973 SUPREME COURT 2520 “*State of U.P. v. Zahoor Ahmad*” the Hon'ble Supreme Court held that the effect of Section 2 of the Government Grants Act, 1895 is that in the construction of an instrument governed by the Government Grants Act, the Court shall construe such grant irrespective of the provisions of the Transfer of Property Act. It does not mean that all the provisions of the Transfer of Property Act, are inapplicable. Relying on said

judgment it is submitted that in respect of lease provisions contained in Ch.V of the Transfer of Property Act are applicable. Relevant paragraph 15 of the said judgment reads as follows:

“15. In the present case the High Court correctly found on the facts that the respondent after the determination of the leave held over. Even if the Government Grants Act applied Section 116 of the Transfer of Property Act was not rendered inapplicable. The effect of Section 2 of the Government Grants Act is that in the construction of an instrument governed by the Government Grants Act the court shall construe such grant irrespective of the provisions of the Transfer of Property Act. It does not mean that all the provisions of the Transfer of Property Act are inapplicable. To illustrate, in the case of a grant under the Government Grants Act Section 14 of the Transfer of Property Act will not apply because Section 14 which provides what is known as the rule against perpetuity will not apply by reason of the provisions in the Government Grants Act. The grant shall be construed to take effect as if the Transfer of Property Act does not apply.”

5. Section 107 of the Transfer of Property Act, 1882 says that a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. Relying on said provision of law, it is submitted that as no registered lease deed has been produced by the plaintiffs and in the government record the disputed land is recorded as nazul land inference can be drawn that after confiscation of the proprietary right of the holders in 1859 the government became superior proprietor of the disputed land and Sri Ramlala became tenant on hold. As the state government vide paragraph 1 of its written statement filed in the instant suit has given up its right by opting not to contest the suit, the status quo ante came into existence and the Lord of Universe Sri Ramlala became proprietor of the disputed land. Relevant paragraph 1 of the written statement of the state government are reproduced as follows:

“1/ That the Govt. is not interested in the properties in dispute and as such the petitioners don't propose to contest the suit.”

(Extract from the written Statement of the State)

6. The Sri Ramjanamsthan sthandil i.e. vedi does not come within the definition of the property or land but is a juridical entity question of its confiscation by virtue of proclamation on 15th March, 1859 by Lord Canning whereby all proprietary rights in the soil of the Oudh province were confiscated, or its vesting into State by virtue of any Act of acquisition does not arise at all. Definition of the property as given in Section 3(26) of General Clauses Act, 1897, Section 3 of the Transfer of Property Act, 1882 and Section 2(6)(9) of the Registration Act, 1908 read as follows:

“**1[3.Definitions.**—In this Act, and in all General Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—

(26) “immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;”

(General Clauses Act, 1897)

3. Interpretation clause.—In this Act, unless there is something repugnant in the subject or context,—

“immovable property” does not include standing timber, growing crops or grass;

“instrument” means a non-testamentary instrument;

“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;

“registered” means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents;

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;

“a person is said to have notice” of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908 (XVI of 1908) from the earliest date on which

any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that—

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (XVI of 1908) and the rules made thereunder,
- (2) the instrument of memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

(Transfer of Property Act, 1882)

2. Definitions.—In this Act, unless there is anything repugnant in the subject of context,—

.....

(6) “immovable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

.....

(9) “movable property” includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immovable property; and

(Registration Act, 1908)

In AIR 1976 SC 1485 (*Vishwa Vijay Bharat. V. Fakhrul Hassan*) the Hon'ble Apex Court has held that presumption of correctness can apply only to genuine entries in the revenue records not forged or fraudulent entries. Fraud and forged rob a document of its legal effect. Relying on said judgment it is submitted that as the entries in the revenue records relied on by the plaintiffs have been found forged, fabricated and interpolated in its scientific examination and analysis by Forensic Science Laboratory, U.P., Lucknow as such the revenue

records in its present interpolated condition cannot be relied on but can be considered a piece of evidence in the light of the report of the Forensic Science Laboratory, U.P., wherefrom it becomes crystal clear that originally in revenue record also Sri Janamsthan was recorded not Jama Masjid. It is noteworthy that even in interpolated revenue record Babri Mosque did not find place. Relevant paragraph no.14 & 15 of the said judgment read as follows:

“14. It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title.

15. In *Amba Prasad v. Mahboob Ali Shah*, (1964) 7 SCR 800 = (AIR 1965 SC 54), it was held by this Court that Section 20 of the U. P. Act 1 of 1951 does not require proof of actual possession and that its purpose is to eliminate inquiries into disputed possession by acceptance of the entries in the Khasra or Khatauni of 1356 Fasli. While commenting on this decision, this Court observed in *Sonawati v. Sri Ram*, (1968) 1 SCR 617, 620 = (AIR 1968SC 466, 468) that “the Civil Court in adjudging a claim of a person to the rights of an adhivasi is not called upon to make an enquiry whether the claimant was actually in possession of the land or held the right as an occupant: cases of fraud apart, the entry in the record alone is relevant.” We have supplied the emphasis in order to show that the normal presumption of correctness attaching to entries in the revenue record, which by law constitute evidence of a legal title, is displaced by proof of fraud.”

PART- XXXV

THE TRANSFEREE HIGH COURT DOES NOT HAVE MORE POWERS THAN THOSE WHICH, BUT FOR THE TRANSFER MIGHT HAVE BEEN EXERCISED BY THE DISTRICT COURT:

1. In (2003) 1 SCC 488 (*Abdur Rahman v. Prasony Bai & Anr.*) the Hon'ble Supreme Court of India has held that when the maintainability of the suit can be adjudicated upon as preliminary issue, it should be decided as preliminary issues and no particular procedure was required to be followed by the High Court as in terms of Order 14 Rule 1 of the Code of Civil Procedure, a Civil Court can dispose of a suit on preliminary issues. Relevant paragraph 21 of the said judgment reads as follows:

“21. For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order 14 Rule 1 of the Code of Civil Procedure, a civil court can dispose of a suit on preliminary issues. It is neither in doubt nor in dispute that the issues of res judicata and/or constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues.”
2. In AIR 1914 PC 41 (*Mrs. Annie Besant. v. G Navayaniah & Anr.*) the Hon'ble Privy Council has held that the transferee High Court does not have more powers than those which, but for the transfer might have been exercised by the District Court. Relevant extract from page 43 of the said judgment reads as follows:

“The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the ninth section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further a suit inter partes is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under Clause 13 of the Letters Patent, 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.”

PART- XXXVI

JUDICIAL PRONOUNCEMENTS ON IDOL, SYMBOLS OF GODS, DEDICATION, SEBAIT, WORSHIPPERS, DEBUTTER PROPERTY SUITS ETC.

1. In (2000) 4 SCC 146 (*Shiromani Gurdwara Prabandhak Committee, Amritsar v. Som Nath Dass & Ors.*) the Hon'ble Supreme Court held that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity living, inanimate, object or thing. It may be a religious institution or any such useful unit which may impel the Courts to recognize it. This recognition is for sub-serving the needs and faith of the society. In the Sikh religion, the Guru is revered as the highest reverential person. It is said that Adi Granth or Guru Granth Sahib was compiled by the Fifth Guru Arjun. The last living Guru, Guru Govind Singh commanded that Guru Granth Sahib would be vibrating Guru. He declared that "henceforth it would be your Guru from which you will get all your guidance and answer". It is with this faith that it is worshipped like a living Guru. It is with this faith and conviction when it is installed in any Gurdwara it becomes a sacred place of worship. Sacredness of the Gurdwara is only because of placement of Guru Granth Sahib in it. This reverential recognition of Guru Grnath Sahib also opens the hearts of its followers to pour their money and wealth for it. It is not that it needs it, but when it is installed, it grows for its followers, who through their obeisance to it, sanctify themselves and also for running the langer which is an inherent part of a gurdwara. In this background, and on overall considerations it must be held that "Guru Granth Sahib " is a "juristic person". Relying on said ratio of law as laid down by the Hon'ble Supreme Court, it is submitted that as Sri Ramjanamsthan is highly reverential sacred place because on that place the Lord of Universe Sri Vishnu appeared in his own *Chaturbhuj Roop* and thereafter on prayer of mother Sri Kausalya took form of Sri Ramlala. As also the Holy Sacred Scripture Skanda Puran and Sri Narsimha Puran command the devotees to visit the birth place of Sri Ram in Ayodhya and worship the sthandil i.e. Sri Ramjanamsthan which will confer upon them all merits as well as salvation. In this faith since the time immemorial the Hindus are worshipping and performing customary rites at Sri Ramjanamsthan with highest devotion and regard as such having *Shastric* sanction Sri Ramjanamsthan is not a property but a juridical entity, i.e. Hindu Deity. Relevant paragraph nos.11, 12, 19, 28-38, 42 read as follows:

11. The very words "juristic person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a "person" in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a "slave" was not a person. He had no right to a family. He was treated like an animal or chattel. In French colonies also, before slavery was abolished, the slaves were not treated to be legal

persons. They were later given recognition as legal persons only through a statute. 156 Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel.

12. In *Roscoe Pound's Jurisprudence*, Part IV, 1959 Edn., at pp. 192-93, it is stated as follows:

"In civilized lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the constitution of Antoninus Pius the slave was not a person. 'He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such like animals, could be the object of rights of property.' ... In the French colonies, before slavery was there abolished, slaves were 'put in the class of legal persons by the statute of April 23, 1833' and obtained a 'somewhat extended juridical capacity' by a statute of 1845. In the United States down to the Civil War, the free Negroes in many of the States were free human beings with no legal rights."


19. Thus, it is well settled and confirmed by the authorities on jurisprudence and courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. This may be any entity, living, inanimate, object or thing. It may be a religious institution or any such useful unit which may impel the courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol was recognised as a juristic person, it was known it could not act by itself. As in the case of a minor a guardian is appointed, so in the case of an idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for a charitable purpose it can create institutions like a church, hospital, gurdwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose inasmuch as he receives it for that purpose alone in trust. When the donor endows for an idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment may be given for various purposes, maybe for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of a juristic person when it is recognised by the society as such.

28. Faith and belief cannot be judged through any judicial scrutiny. It is a fact accomplished and accepted by its followers. This faith necessitated the creation of a unit to be recognised as a "juristic

person". All this shows that a "juristic person" is not roped in any defined circle. With the changing thoughts, changing needs of the society, fresh juristic personalities were created from time to time.

29. It is submitted for the respondent that decisions of courts recognised an idol to be a juristic person but they did not recognise a temple to be so. So, on the same parity, a gurdwara cannot be a juristic person and Guru Granth Sahib can only be a sacred book. It cannot be equated with an idol nor does Sikhism believe in worshipping any idol. Hence Guru Granth Sahib cannot be treated as a juristic person. This submission in our view is based on a misconception. It is not necessary for "Guru Granth Sahib" to be declared as a juristic person that it should be equated with an idol. When belief and faith of two different religions are different, there is no question of equating one with the other. If "Guru Granth Sahib" by itself could stand the test of its being declared as such, it can be declared to be so.

30. An idol is a "juristic person" because it is adored after its consecration, in a temple. The offerings are made to an idol. The followers recognise an idol to be symbol for God. Without the idol, the temple is only a building of mortar, cement and bricks which has no sacredness or sanctity for adoration. Once recognised as a "juristic person", the idol can hold property and gainfully enlarge its coffers to maintain itself and use it for the benefit of its followers. On the other hand in the case of a mosque there can be no idol or any images of worship, yet the mosque itself is conferred with the same sacredness as temples with idols, based on faith and belief of its followers. Thus a temple without an idol may be only brick, mortar and cement but not the mosque. Similar is the case with the church. As we have said, each religion has a different nucleus, as per its faith and belief for treating any entity as a unit.

31. Now returning to the question, whether Guru Granth Sahib could be a "juristic person" or not, or whether it could be placed on the same pedestal, we may first have a glance at the Sikh religion. To comprehend any religion fully may indeed be beyond the comprehension of anyone and also beyond any judicial scrutiny for it has its own limitations. But its silver lining could easily be picked up. In the Sikh religion, the Guru is revered as the highest  163 reverential person. The first of such most revered Gurus was Guru Nanak Dev, followed by succeeding Gurus, the tenth being the last living, viz., Guru Gobind Singhji. It is said that Adi Granth or Guru Granth Sahib was compiled by the fifth Guru Arjun and it is this book that is worshipped in all the gurdwaras. While it is being read, people go down on their knees to make reverential obeisance and place their offerings of cash and kind on it, as it is treated and equated to a living Guru. In the book *A History of the Sikhs* by Khushwant Singh, Vol. I, p. 307 it is said:

"The compositions of the Gurus were always considered sacred by their followers. Guru Nanak said that in his hymns 'the true Guru manifested Himself, because they were composed at His orders and heard by Him' (Var Asa). The fourth Guru, Ram Das said: 'Look upon

the words of the True Guru as the supreme truth, for God and the Creator hath made him utter the words' (Var Gauri). When Arjun formally installed the Granth in the Hari Mandir, he ordered his followers to treat it with the same reverence as they treated their Gurus. By the time of Guru Gobind Singh, copies of the Granth had been installed in most gurdwaras. Quite naturally, when he declared the line of succession of Gurus ended, he asked his followers to turn to the Granth for guidance and look upon it as the symbolic representation of the ten Gurus.

The Granth Sahib is the central object of worship in all gurdwaras.

It is usually draped in silks and placed on a cot. It has an awning over it and, while it is being read, one of the congregation stands behind and waves a flywhisk made of yak's hair. Worshippers go down on their knees to make obeisance and place offerings of cash or kind before it as they would before a king: for the Granth is to them what the Gurus were to their ancestors — the Saccha Padshah (the true Emperor)."

32. The very first verse of the Guru Granth Sahib reveals the infinite wisdom and wealth that it contains, as to its legitimacy for being revered as a Guru. The first verse states:

"The creator of all is One, the only One. Truth is his name. He is doer of everything. He is without fear and without enmity. His form is immortal. He is unborn and self-illuminated. He is realized by Guru's grace."

33. The last living Guru, Guru Gobind Singh, expressed in no uncertain terms that henceforth there would not be any living Guru. The Guru Granth Sahib would be the vibrating Guru. He declared that "henceforth it would be your Guru from which you will get all your guidance and answer". It is with this faith that it is worshipped like a living Guru. It is with this faith and conviction, when it is installed in any gurdwara it becomes a sacred place of worship. Sacredness of the gurdwara is only because of placement of Guru Granth Sahib in it. This reverential recognition of Guru Granth Sahib also opens the hearts of its followers to pour their money and wealth for it. It is not that it needs it, but when it is installed, it grows for its followers, who ~~164~~ through their obeisance to it, sanctify themselves and also for running the langer which is an inherent part of a gurdwara.

34. In this background, and on overall considerations, we have hesitation to hold that "Guru Granth Sahib" is a "juristic person". It cannot be equated with an "idol" as idol worship is contrary to Sikhism. As a concept or a visionary for obeisance, the two religions are different. Yet, for its legal recognition as a juristic person, the followers of both the religions give them respectively the same reverential value. Thus the Guru Granth Sahib has all the qualities to be recognised as such. Holding otherwise would mean giving too restrictive a meaning of a "juristic person", and that would erase the very jurisprudence which gave birth to it.

35. Now, we proceed to examine the judgment of the High Court which had held to the contrary. There was a difference of opinion between the two Judges and finally the third Judge agreed with one of the differing Judges, who held Guru Granth Sahib to be not a “juristic person”. Now, we proceed to examine the reasoning for their holding so. They first erred in holding that such an endowment is void as there could not be such a juristic person without appointment of a manager. In other words, they held that a juristic person could only act through someone, a human agency and as in the case of an idol, the Guru Granth Sahib also could not act without a manager. In our view, no endowment or a juristic person depends on the appointment of a manager. It may be proper or advisable to appoint such a manager while making any endowment but in its absence, it may be done either by the trustees or courts in accordance with law. Mere absence of a manager (sic does not) negative the existence of a juristic person. As pointed out in *Manohar Ganesh v. Lakhmiram*⁸ (approved in *Yogendra Nath Naskar case*⁷) referred to above, if no manager is appointed by the founder, the ruler would give effect to the bounty. As pointed in *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*¹⁰ ILR Mad (at p. 457), by Bhashyam Ayyangar, J. (approved in *Yogendra Nath Naskar case*⁷) the property given in trust becomes irrevocable and if none was appointed to manage, it would be managed by the “court as representing the sovereign”. This can be done by the court in several ways under Section 92 CPC or by handing over management to any specific body recognised by law. But the trust will not be allowed by the court to fail. Endowment is when the donor parts with his property for it being used for a public purpose and its entrustment is to a person or group of persons in trust for carrying out the objective of such entrustment. Once endowment is made, it is final and it is irrevocable. It is the onerous duty of the persons entrusted with such endowment, to carry out the objectives of this entrustment. They may appoint a manager in the absence of any indication in the trust or get it appointed through court. So, if entrustment is to any juristic person, mere absence of a manager would not negate the existence of a juristic person. We, therefore, disagree with the High Court on this crucial aspect.

¶¹⁶⁵ 36. In *Words and Phrases*, Permanent Edition, Vol. 14-A, at p. 167:

“Endowment” means property or pecuniary means bestowed as a permanent fund, as endowment of a college, hospital or library, and is understood in common acceptance as a fund yielding income for support of an institution.”

37. The further difficulty, the learned Judges of the High Court felt, was that there could not be two “juristic persons” in the same building. This they considered would lead to two juristic persons in one place viz., “gurdwara” and “Guru Granth Sahib”. This again, in our opinion, is a misconceived notion. They are no two “juristic persons” at all. In fact both are so interwoven that they cannot be separated as pointed by Tiwana, J. in his separate judgment. The installation of “Guru Granth Sahib” is the nucleus or nectar of any gurdwara. If there is no

Guru Granth Sahib in a gurdwara it cannot be termed as a gurdwara. When one refers a building to be a gurdwara, he refers to it so only because Guru Granth Sahib is installed therein. Even if one holds a gurdwara to be a juristic person, it is because it holds the "Guru Granth Sahib". So, there do not exist two separate juristic persons, they are one integrated whole. Even otherwise in *Ram Jankijee Deities v. State of Bihar*¹¹ this Court while considering two separate deities, of Ram Jankijee and Thakur Raja they were held to be separate "juristic persons". So, in the same precincts, as a matter of law, existence of two separate juristic persons was held to be valid.

38. Next it was the reason of the learned Judges that if Guru Granth Sahib is a "juristic person" then every copy of Guru Granth Sahib would be a "juristic person". This again in our considered opinion is based on an erroneous approach. On this reasoning it could be argued that every idol at private places, or carrying it with one self each would become a "juristic person". This is a misconception. An "idol" becomes a juristic person only when it is consecrated and installed at a public place for the public at large. Every "idol" is not a juristic person. So every Guru Granth Sahib cannot be a juristic person unless it takes a juristic role through its installation in a gurdwara or at such other recognised public place.

42. Thus, we unhesitatingly hold "Guru Granth Sahib" to be a "juristic person".

In AIR 1957 SC 133 (*Deoki Nandan v. Murlidhar*) the Hon'ble Supreme Court held that an endowment can validly be created in favour of an idol or temple without the performance of any particular ceremony i.e. *Sankalp*, *Uthsarga* and *Pratistha* and; in the case of temples the proper word to use is *Pratistha* which takes place of *Uthsarga* in dedication of temples as such where the evidence shows that there was *Pratistha* of certain idol in a temple, it establishes that the dedication was to the public. The Hon'ble Court further held that the *Sankalpa* means determination and is really a formal declaration by the settler of his intention to dedicate the property while *uthsarga* is the formal renunciation by the founder of his ownership in the property. In view of the above-mentioned ratio of law it is submitted that as it is crystal clear from the sacred scripture *Srimad Valmiki Ramayana* that in a portion of the Palace of mother Shri Kaushlya there was a temple of lord Vishnu and it is also evident from another sacred scripture *Sri Skandapuran* that in another part of the said palace there was birth place of Lord of Universe Sri Rama and from the narratives of the Chinese traveller Yuan Chwang (629-645 AD.), William Finch (1608-11 AD.), *East India Gazetteer*, 1828, *The Gazetteer of the Territories under the Government of East India Company and of the Native States on the Continent of India*, 1858 AD. and the *Gazetteer of the Province of Oudh*, 1877-78 AD. it is crystal clear that since time immemorial the Hindus are worshipping the idols installed in the temples of Shri Ramjanamsthan in Ajodhya, the dedication of the temple is conclusive. Relevant paragraph 14 & 15 of the said judgment read as follows:

"14. (3) It is settled law that an endowment can validly be created in favour of an idol or temple without the performance of any particular

ceremonies, provided the settler has clearly and unambiguously expressed his intention in that behalf. Where it is proved that ceremonies were performed, that would be valuable evidence of endowment, but absence of such proof would not be conclusive against it. In the present case, it is common ground that the consecration of the temple and the installation of the idol of Sri Radhakrishnanji were made with great solemnity and in accordance with the Sastras. P.W.10, who officiated as Acharya at the function has deposed that it lasted for seven days, and that all the ceremonies commencing with Kalasa Puja and ending with Sthapana or Prathista were duly performed and the idols of Sri Radhakrishnanji, Sri Shivaji and Sri Hanumanji were installed as ordained in the Prathista Mayukha. Not much turns on this evidence, as the defendants admit both the dedication and the ceremonies, but dispute only that the dedication was to the public.

15. In the court below, the appellant raised the contention that the performance of Uthsarga ceremony at the time of the consecration was conclusive to show that the dedication was to the public, and that as P.W. 10 stated that Prasadothsarga was performed, the endowment must be held to be public. The learned Judges considered that this was a substantial question calling for an authoritative decision, and for that reason granted a certificate under S.109 of the Code of Civil Procedure. We have ourselves read the Sanskrit texts bearing on this question, and we are of opinion that the contention of the appellant proceeds on a misapprehension. The ceremonies relating to dedication are Sankalpa, Uthsarga and Prathista. Sankalpameans determination, and is really formal declaration by the settler of his intention to dedicate the property. Uthsargais the formal renunciation by the founder of his ownership on the property, the result thereof being that it becomes impressed with the trust for which he dedicates it. Vide the Hindu Law of Religious and Charitable Trusts by B.K.Mukherjea, 1952 Edition, p.36. the formula to be adopted in Sankalpa and Uthsarga are set out in Kane's History of Dharmasasatra, Vol.II, p.892. It will be seen therefrom that while the Sankalpa states the objects for the realisation of which the dedication is made, it is the Uthsarga that in terms dedicates the properties to the public (Sarvabhatebyab). It would, therefore, follow that if Uthsargais proved to have been performed, the dedication must be held to have been to the public. But the difficulty in the way of the appellant is that the formula which according to P.W.10 was recited on the occasion of the foundation was not Uthsarga but Prasadothsarga, which is something totally different. 'Prasada' is the 'mandira', wherein the deity is placed before the final installation or Prathista takes place, and the Prathista Mayukha prescribes the ceremonies that have to be performed when the idol is installed in the Prasada. Prasadothsarga is the formula to be used on that occasion and the text relating to it as given in the Mayukha runs as follows:

It will be seen that this is merely the Sankalpa without the Uthsarga, and there are no words therein showing that the dedication is to the public. Indeed, according to the texts, Uthsarga is to be performed only for charitable endowments, like construction of tanks, rearing of gardens

and the like, and not for religious foundations. It is observed by Mr. Mandlik in the *Vyavahara Mayukha*, Part II, Appendix II, p.339 that "there is no utsarga of a temple except in the case of repair of old temples". In the *History of Dharmasastras*, Vol.II, part II, p. 893, it is pointed out by Mr. Kane that in the case of temples the proper word to use is *Prathista* and not *Uthsarga*. Therefore, the question of inferring a dedication to the public by reason of the performance of the *Uthsarga* ceremony cannot arise in the case of temples. The appellant is correct in his contention that if *Uthsarga* is performed the dedication is to the public, but the fallacy in his argument lies in equating *Prasadothsarga* with *Uthsarga*. But it is also clear from the texts that *Prathista* takes the place of *Uthsarga* in dedication of temples, and that there was *prathista* of Sri Radhakrishnaji as spoken to by P.W.10, is not in dispute. In our opinion, this establishes that the dedication was to the public."

In AIR 1966 Pat 235 (*Ram Ratan Lal v. Kashinath Tewari & Ors.*) the Hon'ble Patna High Court held that religious ceremony of *Sankalp* or *Samarpan* is not essential for valid dedication, though sometimes such ceremonies are performed. Relevant paragraph 8 of the said judgment reads as follows:

"8. It is true that no evidence of actual *sankalp* or *samarpan* having been done at the time of dedication was given by the contesting defendants. But the plaintiff also in his plaint did not expressly assert that such ceremonies were not performed. Moreover, it has been pointed out in *Prem Nath v. Har Ram*, AIR 1934 Lah 771, after a review of the judicial decisions, that religious ceremony of *sankalp* or *samarpan* is not essential for a valid dedication, though sometimes such ceremonies are performed. In that decision the previous Patna view on the subject, reported in *Deosaran Bharti v. Deoki Bharti*, AIR 1924 Pat 657 and *Bhekdhari Singh v. Sri Ramchanderji*, AIR 1931 Pat 275; was noticed and explained. There, is also a subsequent Rajasthan decision in *Deeplal v. Parshwanath Digamber Jain Vidyalaya*, AIR 1956 Raj 171 to the effect that no-religious ceremony such as *sankalp* or *samarpan* is necessary for valid dedication.

In this case, however, the dedication took place in 1912-13, more than 50 years ago. There is no evidence on the side of the plaintiff to show that any of the witnesses to the deed of dedication are still alive. In the absence of such evidence and in the absence of any specific allegation in the plaint about the non-performance of *sankalp* or *samarpan*, I would not attach much importance to the absence of evidence on the defendants' side about the actual performance of such religious ceremonies, especially as such ceremonies are not essential to validate the dedication."

In (1932-33) 60 IA 263 (*Kanhaiya Lal v. Hamid Ali*) the Hon'ble Privy Council held that where a suit for possession of a plot of land of a temple is involved the suit/appeal could not be dealt with in the absence of the idol or his representative. Relevant extract from page 264 of the said judgment reads as follows:

“In this case their Lordships, with reluctance, have come to the conclusion that they are not able to deal with the appeal in the absence of Sri Thakurji Maharaj, whose interest arises under the wakf, or his representative. In these circumstances, following the precedent in *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*¹, their Lordships think that the decrees below must be set aside and the case must be remitted to the Chief Court for directions as to a new trial with reference to the effect of the wakf with the appropriate parties added.”

5. In AIR 1960 SC 100 (*Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors.*) the Hon'ble Supreme Court held that under Section 31 of the Evidence Act, 1872 an admission is the best evidence that an opposite party can rely upon, and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Relying on the said proposition of law, it is submitted that as in the written statement of O.S.No.1 of 1989 one of the plaintiffs have admitted that last prayer was offered in the alleged Babri Mosque on 16th December, 1949 and thereafter the Muslims discontinued offering prayer therein from which date Article 142 of the Indian Limitation Act, 1908 limitation starts. As in their several applications and affidavits Mutwallis, Muezzins, Khatibs and other Muslims contestant in 145 Cr.P.C. proceedings have admitted that the Hindus were worshipping in the alleged Babri Mosque treating the same as Sri Ram Janamsthan temple pre and post annexation of Oudh to British Rule and that the possession was abandoned for exclusive user of the said disputed premises solely by the Hindus the plaintiffs' post litem motem statements contrary to the aforesaid admissions are not reliable and liable to be discarded. Relevant paragraph 11 of the said judgment reads as follows:

“11. In the present case, the burden of proof need not detain us for another reason. It has been proved that the appellant and his predecessors in the title which he claims, had admitted on numerous occasions that the public had a right to worship the deity, and that the properties were held as Devasthan inams. To the same effect are the records of the revenue authorities, where these grants have been described as Devasthan, except in a few cases, to which reference will be made subsequently. In view of all these admissions and the revenue records, it was necessary for the appellant to prove that the admissions were erroneous, and did not bind him. An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. We shall now examine these admissions in brief and the extent to which they went and the number of times they were repeated.”

6. In AIR 1925 PC 139 (*Pramatha Nath Mullick v. Pradhyumna Kumar Mulick*) the Hon'ble Privy Council held that an idol is a juristic person and it can sue and be sued and as an idol is not a property it cannot be shifted to other place by the sebaite. In view of the said ratio of law, it is submitted that as in the instant suit the idol of the Lord of Universe Sri Rama has not been impleaded as a party, the instant suit praying for declaration of the temple of said deity as Mosque as also for removal of the said deity from the said premises is not maintainable and is liable to be dismissed. Moreover, the idol cannot be

shifted to any other place as the idol and vedi are not properties no one had right to shift the same from their original location. Relevant extract from page 140C2, 141C1 & 143C1 and 144C2 read as follows:

“One of the questions emerging at this point, is as to the nature of such an idol and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a juristic entity.” It has a juridical status with the power of suing and being sued.”

(ibid Page 140)

The person founding a deity and becoming responsible for these duties is de facto and in common parlance called shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or - as in the case of Sudras, to which caste the parties belonged - by the employment of a Brahmin priest to do so on his behalf.

It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate persona. The position and rights of the deity must in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being.

(ibid Page 141)

There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location and there may no doubt also be a variety of other contracts of such a persona with mundane ideas. But an argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support.

Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognised.

(ibid Page 143)

“According to Hindu law, when the worship of a Thakur has been founded the Shebaitship is held to be invested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution.”

(ibid Page 144)

7. In AIR 1954 Madras 492 N.C.Ramanatha Iyer v. Board of Commrs. For Hindu Religious Endowments, Madras The Hon'ble Madras High Court held that in a Temple where Hindu People had right to worship and worshipping without seeking permission for worshipping, that would be sufficient proof of dedication

of Temple to Hindu Communities. Relevant paragraph 12 of the said Judgement reads as follows:

“ (12) The following facts emerge from the above discussion: 1.The Nurani villagers are a section of the Hindu community and they have undisputed right of worship in the temples as a matter of right and do resort to them also.

2. There is no evidence whatever that any Hindu has been prevented from worshipping in the temples and much less any villager of Nurani.

3. There is further no evidence that anybody sought permission to worship in the temples and according to the evidence of R. Ws. 1 and neighbouring villagers also often worship and submit offerings.

From these circumstances we have to infer that there has been dedication of the temples if not to the entire Hindu community to a section of the Hindu community, and that would be sufficient to bring these institutions within the definition. The appeal, therefore, fails and is dismissed with costs.”

8. In 8 Calcutta Law Journal 369 *Purna Chandra Bysack v. Gopal Lal Sett and others* the Hon'ble High Court Calcutta held that the object of worship is not the image but the God believed to be manifest in the image. If the image is cracked, broken, mutilated or lost, it may be substituted by a new one. Relevant paragraph from page 390 of the said Judgement reads as follows:

“ On the 8th or 11th May 1885, one of the idols was stolen and was afterwards discovered in a disfigured and broken state. It has been suggested, but the suggestion has not been pressed, that this destruction of the idol had the effect of converting into secular property the property which had been endowed for the worship of the idol. If authority were wanted to controvert this contention, it is to be found in Chapter XIV of page 441 of the Treatise on Hindu law by Golap Chandra Sarkar Sastri and the Texts 7 to 10 given in the same Chapter to which he refers. The image or idol is merely the symbol of the Deity, and the object of worship is not the image but the God believed to be manifest in the image for the benefit of the worshipper who cannot conceive or think of the Deity without the aid of a perceptible form on which he may fix his mind and concentrate his attention for the purpose of meditation. If the image be cracked, broken, mutilated or lost, it may be substituted by a new one duly consecrated. The argument has not however been seriously pressed.”

9. In AIR 1925 Calcutta 648 *Kalikanta Chatterjee and others v. Surendra Nath Chakravarty and others* the Hon'ble Calcutta High Court held that where the image is not Anadi, the Restoration after the prescribed period is not invalid. In a question as to the Restoration of an Image, the question to be considered is whether it was meant to be and treated by the people concerned as restoration of the old image. Relevant extracts from page 650 of the said Judgement reads as follows:

“The Learned Munsiff observes “that the new idol is treated by the people as renewal of the old one is proved by the fact that they offer

puja to it in the same way as before. D. W. 9 says that after the installation of the idol the plaintiff and his brother were requested to throw away the Ghot which up to that time had stood for the old deity. This request would not have been made unless the deity represented by the Ghot and the new idol were regarded as the same." From these circumstances it is held by the Courts below that the present installation is not independent of the old and I am unable to hold that they were wrong in so holding.

With regard to the second contention viz., that there could be no restoration of the old image in the present case according to the Shastras, it is urged that the image is admitted in the plaint to be (Self-revealed) and reliance is placed upon a passage in the *Nirnaya Sindhu* (see also *Dharma Sindhu*) which runs as follows:-

.....

"10. Now renewal of Decayed (Image is considered) that is to be performed when a Linga and the like are burnt or broken removed (from its proper place). But this is not to be performed with respect to a Linga or like which is established by a Sadhu or one who has become successful in the highest religious practices, or which is Anadi i.e., of which the commencement is not known or which has no commencement. But there Mahabhishika or the ceremony of great anointment should be performed. This is said by TreVikrama:- *Nirnaya Sindhu* of Kamalakara Bhatta, Bombay Edition of 1900, page 264 (See Golap Chandra Sarkar's *Hindu Law*, 4th Edition 473). But according to the plaintiff the image was installed by some remote ancestor of his, while according to the defendants it was installed by one Jantridhar. The image therefore does not appear to be Anadi. It is then urged even if the image had a commencement, the restoration had not been made within the time prescribed. But the text from *Haya Sirsha* upon which reliance is placed, while laying down that the restoration after the prescribed period is blameworthy does not say that it is altogether invalid.

Here again I think the question to be considered is whether it was meant to be, and treated by the people concerned as restoration of the old image."

10. In ILR 37 Calcutta 128 *Bhupati Nath Smrititirtha v. Ram Lal Maitra* a Full Bench comprised of the Hon'ble 5 Justices of the Hon'ble Calcutta High Court on reference held that a Deity is forever existent and is a Juristic person, an image is its manifestation form; in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all and the law which is applicable in respect of Secular gift is not applicable in respect of gift / bequest for establishment and worship of a Hindu deity and according to Hindu Law the rule about the acceptance of gifts as a necessary condition for its validity was applicable to secular gifts only.

In view of conflicting decisions a Division Bench of the said Hon'ble High Court had referred the questions for decisions by a full Bench as follows:

“(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator’s death and make such a bequest void?

(ii) Whether the cases of *Upendra Lal Boral v. Hem Chundra Boral* (1), *Rojomoyee Dasse v. Troylukho Mohiney Dasse* (2) and *Nogendra Nandini Dassi v. Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

(ibid 134-5)

The Hon’ble Full Bench answered both the questions referred to it in the negative.

In the said Full Bench Judgment the Hon’ble Mookerjee J. in concurrence with the judgment of the Hon’ble C.J. and other Hon’ble Justices recorded his decision separately relevant extracts whereof read as follows:

“We start with the position that in the case of deities there can not be any acceptance and therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity, cannot accept. In whom does the property vest? The answer is that the King is the custodian of all such property. This is sufficiently indicated by the following passages: Vijnaneswar in the *Mitakshara* (*Vyavahara adhaya*, verse 186) lays it down that one of the duties of the King is the protection of the *Devagriha*, and *Aparaditya* and *Mitramisra* in their commentaries on the same subject lay down the rule in the same manner. In the *Sukraneeti*, Chapter IV, verse 19, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God.”

(ibid page 155)

“*Jagannath* in Book II, Chapter IV, Section I, Verse 3, touches upon this matter, and points out that the text of *Narada* relating to the recovery of objects of gifts not duly given (*Asiatic Society’s Edition* 137) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of *Tagore v. Tagore* (1) and *Bai Motivahu v. Bai Mamubai* (2), as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be

upheld, inasmuch as the deity is always existent, and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a particular image of Kalee is established or not, the Goddess Kalee is ever existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following passage quoted by Raghunandan:

..... Sanskrit text.....

It is for the benefit of the worshippers or devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute, which consists of pure spirit, and which is without a second being.”

Various passages of the same import are to be found in other authorities, for instance, Haratatwadidheeti and Mahanirvantantra (4, 16), the latter of which quotes a passage from Mundamalatantra and gives other text of similar import from Kularnabtantra and Agastya Sanhita. From this point of view also, the position of the appellant may be undoubtedly supported; but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.”

(ibid page 156-57).

“To sum up

(i). The view that no valid dedication of property can be made by a Will to a deity, the image to which is not in existence at the time of the death of the testator is based up a double fiction namely, first that the Hindu deity is for all purposes a juridical person and secondly that a dedication to the deity has same characteristics and is subject to the same restriction as a gift to a human being. The first of these propositions is too broadly stated and the second is inconsistent with the first principle of Hindu Jurisprudence.

(ii). The Hindu law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed extra-commercium and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments: Manohar Ganesh Tambekar v. Lakhmiram Gorindram (4) affirmed, on appeal, by the Judicial Committee in Chotalal Lakhmiram v. Manohar Ganesh Tambekar (5). It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds, I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.”

(ibid Page 161)

In the said Full Bench Judgment the Hon'ble Chatterjee J. in concurrence with the judgment of the Hon'ble C.J. and other Hon'ble Justices recorded his decision separately relevant extracts whereof read as follows:

"Shastri's Hindu Law, 3rd Edn. Page 420, shows the Hindu idea of the forms attributed to God for the convenience of worship. A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated Thakur become vested in the substituted Thakur. A Hindu does not worship the "idol" or the material body made of clay or gold or other substances, as a mere glance at the mantras and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form. Which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the mantras peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to either view, it is the relinquishment of property, in the name of the deity, for securing its gratification that completes the gift, and such relinquishments are valid according to Hindu law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God-head, that is worshipped in a particular form, but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu law had such a gross idea of the divinity they worshipped. In the view of the case also, the text of the Dayabhaga relied on in the Tagore case (1) cannot invalidate the gift in favour of a deity whose image is consecrated after the death of the donor.

Then again, their Lordships of the Judicial Committee, in the Tagore case (1) say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned, as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator, although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name: 'Ram,' 'Shyam' or 'Gopal.' It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will show, but if it were necessary, there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

I have stated above that in the case of a gift to a God, the relation of an owner to the thing owned in its primary sense is considered to be wanting. Who then is the owner of the property? In a secondary sense,

no doubt, the deity is the owner, but the shastras lay down
(Sanskrit text)..... i.e., "Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless.

Matsya Sooktam quoted by Raghunandan in his Shuddhitatwa (2).

Every gift, therefore, in favour of a deity is a gift for the ultimate benefit of a Brahman, and may, therefore, be looked upon as a charitable gift."

(1) (1872) 9 B.L.R. 377; 18 W.R. 359; L.R.I.A. Sup.Vol.47

(2) Shuddhitatwa, Bang.Ed.p.557.

(ibid 167-69)

"If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

In the present case again, the testator does not expressly make a gift to Kalee. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way, by spending the same in the establishment, sheba and pooja of the Goddess Kalee under the name and style of Iswar Anandamoyee Kalee. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative."

(ibid Page 170).

11. In ILR 51 Calcutta 953 Administrator-General of Bengal and Another v. Balkissen Misser and Others, the Hon'ble Calcutta High Court held that where a Shebait has not been appointed it is permissible to file a suit for possession in the name of the idol and the Court is to appoint agent *ad litem*. Relying on said proposition of law it is humbly submitted that as in the instant suit wherein a decree has been sought inter alia for removal of the Idol of the Lord of Universe Sri Ram without making the idol party to the suit, the decree passed therein cannot be executed against the said Idol who is a juristic entity as such the suit is not maintainable and is liable to be dismissed. Relevant extract from the said Judgement reads as follows:

"I think, however, that Jagadindra's case (1) must be read in the light of the later decision in Damodar's case (2), where it was held that adverse possession affects the right and interest of the idol as well as the right and interest of the shebait, and in my opinion where adverse possession is proved, time will also run against the idol even in circumstances such as those obtaining in the present case where no shebait has been appointed. But is it not permissible in case where a shebait has not been appointed to file a suit for possession in the name of the idol? I think that it is, although no doubt the Court will appoint some person to act as agent *ad litem* for the idol. It would, I imagine, sound a strange doctrine in the ears and the heart of a Hindu

that a public company which has neither mind nor morals, sense or sensibility, is a juri-tic entity deemed fit to promote or defend proceedings in its own name, while a god, whose tabernacle the image is, although a juristic entity capable of being endowed with the title to property both moveable and immoveable, is regarded in law as unfit to institute or defend suits in its own name. In my opinion, the defendants would have been unable to resist a claim for possession if the present suit had been instituted in the name of the thakur. The same result would have followed if the suit had been brought by the Advocate-General, or by any one or more persons who were, - or indeed might be, - worshippers at the shrine of the god whose image was set up in the said premises, or by any other persons interested in the maintenance of the religious observances to be carried on therein (ibid 959).

12. In ILR 44 Bombay 466 , Hari Raghunath Patvardhan v. Antaji Bhikaji Patvardhan and others, the Hon'ble Bombay High Court held that under Hindu law, the manager / shebait of a public temple has no right to remove the Image from the old temple and install it in another new building. Relying on that ratio of law it is respectfully submitted that erection of Ram Chabutara in 1856 by certain Mahanta or interested person cannot be and should not be construed substitution of Sacred Sri Ramajanamasthan as it was neither recognised nor can be recognised as Sri Ramajanamasthan by the worshippers which is evident from the applications of the Mutavallis / Khattibs / Muezzins of the alleged Babri Mosque wherein they have admitted that the Hindus were worshipping and asserting their right to worship inside the disputed structure even after 1856 and onwards. Relevant extract from the said Judgment reads as follows:

"We are concerned in this appeal only with the question of law which has been raised on behalf of the defendant that as a manager he is entitled to remove the image and to install it in the new building. It is common ground now that the existing temple is an ancient public temple. It is also common ground that the defendant has been the manager of this temple for a number of years. It is not disputed that existing building is in a ruinous condition and that it may be that for the purpose of effecting the necessary repairs the image may have to be temporarily removed. Still the question is whether the defendant as manager is entitled to remove the image with a view to its installation in another building which is near the existing building. Taking the most liberal view of the powers of the manager, I do not think that as the manager of a public temple he can do what he claims the power to do, viz., to remove the image from its present position and to install it in the new building. The image is consecrated in its present position for a number of years and there is the existing temple. To remove the image from that temple and to install it in another building would be practically putting up a new temple in place of the existing temple. Whatever may be the occasions on which the installation of a new image as a substitute for the old may be allowable according to the Hindu law, it is not shown on behalf of the defendant that the ruinous condition of the existing building is a ground for practically removing the image from its present place to a new place permanently. We are not concerned in this suit with the question of the temporary removal

which may be necessary when the existing building is repaired. The defendant claims the right to install it in the new building permanently, and I do not think that as a manager he could do so, particularly when he is not supported by all the worshippers of the temple in taking that step (ibid 470-71)."

13. In 12 CWN 951 PC, Sankaralinga Nadan v. Raja Rajeswara Dorai alias Mutturamlinga Dorai and others, the Hon'ble Privy Council upheld the decision of the Madras High Court wherein it was held that it is the duty of the trustee / shebait to maintain the customary usage of the temple, and if he fails to do so he is guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it. Relying on said principle of law it is humbly submitted that if in past any person claiming himself to be a Mahant of Sri Ramajanamasthan had attempted to erect a new temple on Sri Ramchabutara to effect a vital change of usage which amounted to the breach of trust is of no consequence as it is quite impossible to change Sri Ramajanamasthan. Relevant extract from the said Judgment reads as follows:

" Where an institution exists for the purpose of religious worship, or the class for whose benefit it was established, cannot be discovered from the instrument creating the trust, (or where, as in the present case there is no such instrument), the Court can find no other means of deciding those questions than through the medium of an enquiry into what has been the usage of the worshippers in respect thereto, and, if the usage is a lawful one, it is the duty of the Court to support that usage on the suit, legally instituted, of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded, or to say to the other worshippers 'We have changed our opinions, and you who resort to this place for the purpose of worshipping in the customary manner, shall no longer enjoy the benefit intended for you unless you conform to the alteration which has taken place in our opinions, even to the extent of submitting to the presence of other worshippers who are prohibited by custom and the shastras from entering into the temple.' It is not in the power of any trustee to say this to the other worshippers in a temple. On the contrary, it is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so, he is in our opinion, guilty of a breach of trust and, still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it.

(ibid p.951).

14. In ILR 33 Allahabad 735, Jodhi Rai v. Basdeo Prasad and others, a Full Bench the Hon'ble Allahabad High Court held that as a suit against a minor should brought in the name of the minor and not his next friend, so should a suit on behalf of the idol be brought in the name of the idol as represented by the manager/shebait, in a suit against the idol the defendant should be similarly described. Relying on said proposition of law it is submitted that as the plaintiffs have not made the Idol of the Lord of Universe Sri Ram as party

defendant, the instant suit for removal of the said Idol as well as for declaration of the said Idol's Debotter Property as a Mosque and delivery of the possession thereof is not maintainable and is liable to be dismissed on this ground alone. Relevant extract from the said Judgment reads as follows:

" In support of his opinion the Learned Judge relied on the decision of this Court in *Thakur Maharaj v. Shah Lal Chand* (1). In that case a Bench of this Court held that a suit relating (the) property alleged to belong to a temple cannot be brought in the name of the idol of the temple. The learned Judges in their Judgement gave no reason for this opinion beyond the fact that there may be difficulties about realizing costs. With great respect we are unable to agree with the learned Judges. An idol has been held to be a juristic person who can hold property. Therefore, when a suit is brought in respect of property held by the idol, it is the idol who is the person bringing the suit or against whom the suit is brought, the idol being the person beneficially interested in the suit. No doubt, in every suit the party bringing it or the party against whom it is brought must, when he is suffering from an incapacity, be represented by some other person, as in the case of an infant or a lunatic. Therefore, when a suit is brought on behalf of or against an idol, there must be on record a person who represents the idol, such as the manager of the temple in which the idol is installed. The manager of the idol is not personally interested in the suit, any one than is the next friend or guardian of a minor. As a suit (against) a minor should brought in the name of the minor and not his next friend, so should a suit on behalf of the idol be brought in the name of the idol as represented by the manager, in a suit against the idol the defendant should be similarly described. It is true that every pleading must be signed by a sentient being; but this can be done by the manager, just in the same way as in the case of an infant the pleadings are signed by his next friend or guardian for the suit the first defendant in this suit was, therefore, properly described in the plaint, and view of the Learned Judge in this respect is in our Judgement erroneous.

(1) (1897) ILR 19 Allahabad, 330

(ibid page 737)

15. In AIR 1967 SUPREME COURT 1044 "*Bishwanath v. Thakur Radha Ballabhli*" the Hon'ble Supreme Court held that when an alteration such as void alienation has been effected by the shebait acting adversely to the interests of the idol, even a worshipper can file the suit, the reason being that the idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest, In recovering the possession of its property from a person who is in illegal possession thereof, the idol is only enforcing its private right and, therefore, S. 92 of Code of Civil Procedure is not applicable to such a suit instituted by idol for recovery of its property. Relying on the said proposition of law it is submitted that even as the then Shebait had no right to alienate the property of the Lord of Universe i.e. either Sri Ramjanamsthan Temple or its land and materials of the Temple

erection of the alleged mosque either by the Emperor Babur or by the tyrant Emperor Aurangzeb over the Temple land by using its materials in any manner whatsoever was illegal in accordance with the personal laws of the Hindus as well as Muslims. Relevant paragraph 7 and 10 of the said judgment reads as follows:

"7. It is settled law that to invoke S.92 of the Code of Civil Procedure, 3 conditions have to be satisfied, namely, (i) the trust is created for public purposes of a charitable or religious nature, (ii) there was a breach of trust or a direction of Court is necessary in the administration of such a trust, and (iii) the relief claimed is one or other of the reliefs enumerated therein. If any of the 3 conditions is not satisfied, the suit falls outside the scope of the said section. A suit by an idol for a declaration of its title to property and for possession of the same from the defendant, who is in possession thereof under a void alienation, is not one of the reliefs found in S. 92 of the Code of Civil Procedure. That a suit for declaration that a property belongs to a trust is held to fall outside the scope of S. 92 of the Code of Civil Procedure by the Privy Council in *Abdur Rahim v. Abu Mahomed Barkat Ali*, 55 Ind App 96 : (AIR 1928 PC 16), and by this Court in *Pragdasli Guru Bhagwandasji v. Ishwarlalbhai Narsibhai*, 1932 SCR 513: (AIR 1952 SC 143), on the ground that a relief for declaration is not one of the reliefs enumerated in S. 92 of the Code of Civil Procedure. So too, for the same reason a suit for a declaration that certain properties belong to a trust and for possession thereof from the alienee has also been held to be not covered by the provisions of S. 92 of the Code of Civil Procedure : See *Mukhda Mannudas Bairagi v. Chagan Kisan Bhawasar*, ILR(1957) Bom 809: (AIR 1959 Bom 491). Other decisions have reached the same result on a different ground, namely, that such a suit is one for the enforcement of a private right. It was held that a suit by an idol as a juristic person against persons who interfered unlawfully with the property of the idol was a suit for enforcement of its private right and was, therefore, not a suit to which S. 92 of the Code of Civil Procedure applied : See (*Darshan Lal v. Shibji Mahraj Birajman*, ILR 45 All 215 : (AIR 1923 All 120); and *Madhavrao Anandrao v. Shri Omkareshvar Ghat*, 31 Bom LR 192 : (AIR 1929 Bom 153). The present suit is filed by the idol for possession of its property from the person who is in illegal possession thereof and, therefore, it is a suit by the idol to enforce its private right. The suit also is for a declaration of the plaintiff's title and for possession thereof and is, therefore, not a suit for one of the reliefs mentioned in S. 92 of the Code of Civil Procedure. In either view, this is a suit outside the purview of S. 92 of the said Code and, therefore, the said section is not a bar to its maintainability.

10. The question is, can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard its interest. On principle we do not see any justification for denying such a right to the worshipper. An idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest. It is a pragmatic,

yet a legal solution to a difficult situation. Should it be held that a Shebait, who transferred the property, can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas that may be open to the transferee in a suit. Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment; see *Radhabai v. Chimnaji*, (1878) ILR 3 Bom 27, *Zafaryab Ali v. Bakhtawar Singh*, (1883) ILR 5 All 497 *Chidambaranatha Thambirarn v. P. S. Nallasiva Mudaliar*, 6 Mad LW 666 : (AIR 1918 Mad 464), *Dasondhay v. Muhammad Abu Nasar*, (1911) ILR 33 All 660 at p. 664: (AIR 1917 Mad 112) (FB), *Radha Krishnaji v. Rameshwar Prasad Singh*, AIR 1934 Pat 584, *Manmohan Haldar v. Dibbendu Prosad Roy*, AIR 1949 Cal 199."

16. In AIR 1985 ALLAHABAD 228 "*Bhagauti Prasad Khetan v. Laxminathji Maharaj*" the Hon'ble Allahabad High Court held that where a suit was filed by the worshipper of the deity for declaration and permanent injunction about unauthorised alienation of debutter properties in the capacity of the next friend of the deity and there was nothing on record indicating that the worshipper was going to gain something by instituting the suit and the suit was filed with an ulterior motive, the suit could not be said to be not maintainable as it was not defective. The prior appointment of next friend in such cases by the court was not necessary and Section 34 of Specific Relief Act does not affect the maintainability of the suit in any way and the suit also falls outside the purview of the S.92 of C.P.C. it has also been held that alienation of property by Shebait Sale would be void and ineffective after expiry of shebait's tenure. Relying on the aforesaid proposition of law it is submitted that in absence of the Shebait the worshipper can sue and defend in any suit right Title and interest of the Idol and even under the Secular law of limitations the limitation starts from the death of the Shebait during whose tenure property of the Idol was illegally occupied or alienated. The relevant paragraph No. 10, 12, 17, 18, 19, 20, 21, 22 and 43 of the said judgment read as follows:

"10. The first point argued by the learned counsel for the appellants is that Atma Ram plaintiff 2 respondent 2 had no right to represent the deity and the suit filed was not maintainable. We do not find any force in this argument.

12. The appellants in order to show that Atma Ram plaintiff 2 cannot be a worshipper suggested that he is residing at Deoria, Uttar Pradesh whereas the deity is in Jhunjhunu Rajasthan which is at a distance of 800 miles from his place of residence. It is undisputed that his

ancestors were residents of Jhunjhunu and in connection with their business they came to Deoria a few years back and settled there. Atma Ram plaintiff 2 (P.W. 1) has stated that he goes to Jhunjhunu 4 or 5 times a year and worships deity there. It is also been added by him that his ancestral house is still there and some of his family members still live at Jhunjhunu. In cross-examination he further added that in connection with the marriages and other functions he goes to Jhunjhunu. Bhagauti Prasad defendant 1 who examined himself as D. W. 1 could not deny that the ancestral house of Atma Ram is in Jhunjhunu and some of his family members still reside there. He simply stated that he did not see Atma Ram at Jhunjhunu and worshipping the deity in the temple. This statement is quite insufficient to make the statement of Atma Ram (P. W. 1) unworthy of reliance. Madan Lal Joshi (D. W. 3 Examined on Commission) who is a resident of Jhunjhunu stated in cross-examination that all the original residents of Jhunjhunu who migrated elsewhere come to Jhunjhunu for mundan, piercing of nostrils and ears ceremonies and after marriage to offer pooja path. This statement clearly supports the deposition of Atma Ram (P. W. 1). It, therefore, appears established that Atma Ram, plaintiff 2 is not only entitled to worship the deity but actually worships it off and on. It cannot, therefore, be held that Atma Ram is not a worshipper and cannot bring the suit in such a capacity.

17. In view of these observations of the Supreme Court it cannot be accepted that the worshipper in a suit in which an alienation by Shebait has been challenged, cannot represent the deity.

18. The third point argued by the learned counsel for the appellants in connection with the maintainability of the suit is that in the present case Atma Ram did not apply for leave of the Court to sue as a next friend of the idol and as such the suit filed by him was not maintainable. In support of this argument he placed reliance upon Smt. Sushma Roy v. Atul Krishna Roy, AIR 1955 Cal 624 and Iswar Radha Kanta Jew Thakur v. Gopinath Das, AIR 1960 Cal 741. It was held in these cases that anybody other than Shebait suing on behalf of the idol must be appointed as next friend by the Court on application by him to that effect. After having carefully gone through these cases we find ourselves unable to agree with these observations. A glance on the judgment reported in AIR 1955 Cal 624, shows that the decisions of Calcutta High Court are not uniform on the appointment of the next friend by the Court. It has been held in Annapurna Devi v. Shiva Sundari Dasi, AIR 1945 Cal 376 that appointment of the next friend by the Court is not necessary. Moreover in AIR 1960 Cal 741 it was observed at page 748 that:

“A worshipper or a member of the family has no doubt his own right to institute a suit to protect his right to worship and for that purpose to protect the debutter property. That is, however, a suit by the member of the family or worshipper in his personal capacity and not a suit by the deity. The deity has also a right of its own to have a suit instituted by a next friend.....Anybody can act as such next friend, but the law

requires that anybody other than Shebait instituting the suit in the name of deity must be appointed as such by an order of the Court.”

19. It indicates that no appointment is necessary, if the suit is filed by a worshipper. Here Atma Ram has joined the suit as worshipper also. Thus the maintainability of the suit remains unaffected. Apart from this, in *Ram Ratan Lal v. Kashi Nath Tewari*, AIR 1966 Pat 235 and *Angoubi Kabuini v. Imjao Lairema*, AIR 1959 Manipur 42 it was held that such an appointment is not necessary. The Supreme Court has clearly held in *Bishwanath v. Sri Thakur Radha Ballabhji*, AIR 1967 SC 1044 that the worshipper has an ad hoc power of representation of the deity when the Shebait acts adversely. It follows from this the worshipper having right to represent the deity can represent the deity without any specific order from the Court about his appointment. There is no definite procedure laid down in the Civil P.C. relating to suits on behalf of idol. The provisions of order 32 C.P.C. which relate to minor do not specifically provide for the appointment of the next friend. It may also be added in this connection that the defendants, appellants did not raise any objection before the trial Court that Atma Ram should first make an application for his appointment as next friend of the deity and then the suit can proceed. Atma Ram clearly alleged in para 1 of the plaint that he is representing the deity as its next friend. The manner in which he was allowed to continue the suit indicates that he should be deemed to have been accepted as next friend of the deity. Thus the suit cannot be held not maintainable because Atma Ram did not make an application and was not appointed as next friend of the idol plaintiff 1 in the trial Court.

20. The evidence on record does not show that he has any interest adverse to the interest of the idol. There is nothing on record indicating that Atma Ram is going to gain something by instituting the suit and it has been filed with an ulterior motive. He has incurred expenses and undertook the trouble of the litigation only to show that an idol was going to be deprived of its properties in an unauthorised and illegal manner. He, therefore, brought the suit in the name of the deity as its next friend and joined in the suit as a worshipper also. The suit does not, therefore, appear defective as argued by the learned counsel for the appellants.

21. It was lastly argued in connection with the maintainability of the suit that it is barred by S.34, Specific Relief Act and S.92 Civil P.C. We do not find any force in this argument also. The suit is for declaration and permanent injunction about alienation of debutter properties. It has been held in *Vemareddy Ramaraghawa Reddy v. Kondaru Seshu Reddy*, AIR 1967 SC 436 that worshipper can file a suit for declaration without claiming relief for possession. It is undisputed that the property alienated is in possession of the tenants and as such in the present case the relief for actual possession could not be claimed. At the most the deity could claim constructive possession, where the plaintiff is entitled to constructive possession by receipt of rent from the defendant, a declaration of title is all he needs, because under such circumstances even if he asks for possession it can only be delivered by notifying the

declaration of the plaintiff's title which has already been prayed for. The plaintiffs could claim further relief for perpetual injunction and that has been claimed. Thus S.34, Specific Relief Act does not affect maintainability of the suit in any way.

22. The present suit is only in respect of unauthorised alienation of debutter properties. It is, for enforcement of a private right of property of the deity. In *Bishwanath v. Sri Thakur Radha Ballabhji*, AIR 1967 SC 1044 the observations are to the effect that suit by the deity for declaration and possession challenging the alienation is for the enforcement of a private right by the idol and not being for any one of the reliefs found in S.92 C.P. Code. The suit therefore falls outside its purview and is not barred. Thus the suit does not appear not maintainable in view of S.92 Civil P.C. also.

45. Section 7 of the Act lays down that no valid transfer of a property of Hindu public religious institution can be made without prior written sanction of the Commissioner. In the present case no such permission was obtained. Thus the sale deeds are invalid on this ground also. Learned Civil Judge has discussed this point at length and his finding that the sale deeds are not valid and effective for want of such a previous approval cannot therefore, be assailed. Thus the last argument of appellant's counsel also falls to the ground."

17. In AIR 1927 Privy Council 128 "*Radha Binode Mandal v. Sri Sri Gopal Jiu Thakur*" the Hon'ble Privy Council held that prior suit filed by the someone as Shebait of the Deity and subsequent suit filed by the Deity represented by the Shebait are two different suits inspite of the fact that same property was subject matter of the both suits and 2nd suit is not barred by *res judicata* because the prior suit was not between the same parties as those in the subsequent suit. Relevant extracts from the said judgment from page 128 C2 and page 129 C2 read as follows:

"The plaintiffs in the suit which is now under consideration, viz., No. 155 of 1919, are the two gods, Gopal Jiu Thakur and Shambuth Nath Shib Thakur, suing by the Shebait Narendra Nath Mandal.

In their Lordships' opinion these two gods were not parties to the 1915 suit.

It is true that in the 1915 suit the plaintiffs were described as 'Sri Sri Iswar Gopal Jiu Thakur's Shebait', and it was argued that the 1915 suit must therefore be regarded as having been brought on behalf of the deity "Gopal Jiu."

Their Lordships, however, are not prepared to accept that argument.

It is to be noted that not only were the plaintiffs described as the shebait of the god, but the defendants also were described in the same way. Therefore, if the god Gopal Jiu were to be regarded as a plaintiff, he must also be regarded as a defendant, which would be a *reductio ad absurdum*.

For the consideration of this point, however, it is necessary to examine not only the heading of the plaint, but also the allegations therein.

In their Lordships' opinion, the allegations in the plaint show that the 1915 suit was based upon the assumption that the properties were debuttar properties, and that the suit was brought for the purpose of having a scheme framed by the Court for the preservation and management of the properties and for the performance of the daily and periodical shebas.

The suit, it was alleged, had become necessary by reason of the disputes as to the management of the properties between the plaintiffs and some of the defendants, all of whom were alleged to be shebait of the god, and it was apparently not thought necessary to make the two gods, the plaintiffs in the present suit, parties to the 1915 suit.

In their Lordships' opinion the description of the plaintiffs and the defendants in the 1915 suit as shebait of the Thakur, and the nature of the suit, as disclosed by the allegations in the plaint, are not sufficient to constitute the 1915 suit a suit by or on behalf of the gods, who are the plaintiffs in the present suit, viz., No. 155 of 1919.

The result, therefore, in their Lordships' opinion, is that the suit of 1915 was not between the same parties as the parties in the suit now before the Board ; the case, therefore, does not fall within S. 11 of the Code of Civil Procedure, 1908, or within the statement of the general law made in *Krishna Belari Roy v. Bunvari Lal Roy* (1)"

18. In AIR 1960 CALCUTTA 741 "*Sri Iswar v. Gopinath Das*" the Hon'ble High Court Calcutta held that according to Hindu Law, the sebaite represents the deity and he alone is competent to institute a suit in the name of the deity, however, in exceptional circumstances where the sebaite does not, or by his own act deprives himself of the power of representing the deity, a third party is competent to institute a suit in the name of the deity to protect the debutter property. A worshipper or a member of the family has no doubt his own right to institute a suit to protect his right to worship and for that purpose to protect the debutter property. That is, however, a suit by the member of the family or worshipper in his personal capacity and not a suit by the deity. The deity has also a right of its own to have a suit instituted by a next friend. The person entitled to act as next friend is not limited to the members of the family or to worshippers. Anybody can act as such next friend, but the law requires that anybody other than sebaite instituting a suit in the name of the deity must be appointed as such by an order of the Court. The decree obtained in a suit not validly instituted, is void and not binding on the deity. Relying on said proposition of law it is submitted that any decree passed in a suit not validly instituted is void and not binding on the Deity i.e. the Lord of Universe Sri Ram as also that this defendant has right to defend right and property of the Deity in the instant suit. Relevant paragraph 18 of the said judgment reads as follows:

"18. Suit No. 980 of 1945 instituted by Rajen Sen in the name of the deity has been challenged, on the ground that Rajen Sen had no authority in law to institute the suit. According to Hindu Law, sebaite represents the deity and he alone is competent to institute a suit in the name of the deity. In exceptional circumstances, however, where the sebaite does not, or by his own act deprives himself of the power

of representing the deity, a third party is competent to institute a suit in the name of the deity to protect the debutter property. Dr. Das contends that such a party must be a member of the family or a worshipper and that a total stranger, in law, is not competent to institute a suit in the name of the deity. I do not, however, consider this to be the correct view in law. A worshipper or a member of the family has no doubt his own right to institute a suit to protect his right to worship and for that purpose to protect the debutter property. That is, however, a suit by the member of the family or worshipper in his personal capacity and not a suit by the deity. The deity has also a right of its own to have a suit instituted by a next friend. As I understand the law, the person entitled to act as next friend is not limited to the members of the family or worshipper. Anybody can act as such next friend, but the law requires that anybody other than sebaite instituting a suit in the name of the deity must be appointed as such by an order of the court. That is the law as recognised by this Court. Reference may be made to the case of *Tarit Bhusan v. Sreedhar Salagram*, 45 Cal. WN 932 : (AIR 1942 Cal 99), *Sreedhar Jew v. Kanto Mohan*, 50 Cal. WN 14 : (AIR 1947 Cal 213), and *Sushama Roy v. Atul Krishna Roy*, 59 Cal WN 779 : ((S) AIR 1955 Cal 624)."

19. In 1903-04 31 IA 203 *Maharaja Jagadindra Nath Roy Bahadur Vs. Rani Hemanta Kumari Debi* the Hon'ble Privy Council held that where the dedication is of the completest character, the Idol as a juridical person is capable of holding property but the possession and management of the dedicated property with the right to sue in respect of it are vested in the Shebait and where the right to sue accrued during the minority of the Shebait the suit filed by Shebait after attaining majority within the prescribed period of limitation which starts from the date of attaining age of majority of such Shebait is maintainable under Section 7 of the Limitation Act, XV of 1877. Relying on said judgment it is submitted that unless the name of the Shebait during whose period the Deity was dispossessed by the plaintiffs are known limitation cannot be counted; as this ingredient is missing in plaint the prayer seeking relief on ground of adverse possession is liable to be rejected. Relevant extracts from the said judgment read as follows:

"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee*⁶ and *Ashutosh Dutt v. Doorga Churn Chatterjee*⁷ are instances of less complete dedications, in which, notwithstanding a religious dedication, property descends (and descends beneficially) to heirs, subject to a trust or charge for the purposes of religion. Their Lordships desire to speak with caution, but it seems possible that there may be other cases of partial or qualified dedication not quite so simple as those to which reference has been made.

If it were necessary to determine the nature of the dedication in the present case, their Lordships would have felt great difficulty in doing

so. On the one hand, the use of the term "sebait" in the settlement pottahs of 1868 and 1877, and in the plaint in this suit, points rather to a dedication of the completest character. On the other hand, the provisions in those pottahs which impose liability upon the grantees to the whole extent of their own property, and not merely to the extent of what they might hold as sebait, suggest a different conclusion. And so does the clause in the pottah of 1868 empowering Government to determine the term on death.

But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the sebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the sebait, not in the idol. And in the present case the right to sue accrued to the plaintiff when he was under age. The case therefore falls within the clear language of s. 7 of the Limitation Act, which says that, "If a person entitled to institute a suit . . . be, at the time from which the period of limitation is to be reckoned, a minor," he may institute the suit after coming of age within a time which in the present case would be three years.

It may be that the plaintiff's adoptive mother, with whom the settlement of 1877 was made as sebait, might have maintained a suit on his behalf and as his guardian. This is very often the case when a right of action accrues to a minor. But that does not deprive the minor of the protection given to him by the Limitation Act, when it empowers him to sue after he attains his majority. For these reasons their Lordships are unable to concur with the learned judges in thinking that these suits are barred by limitation."

20. In 1874-75 2 IA 145 Prosunno Kumari Debya and Another Vs. Golab Chand Baboo the Hon'ble Privy Council held that the property devoted to religious purpose is, as a rule, inalienable and the Authority of the Sebait of an Idol's Estate analogous to that of the manager for an infant heir. Relying on said judgment it is submitted that the property of the Deity the Lord of Universe Sri Ram even was and is inalienable and anyone who is appointed agent ad-litem by this Hon'ble Court or Sebait by the Superior Sebait i.e. the patron of this defendant His Divine Majesty Srimad Jagadguru Shankaracharya Jyotirmath-Badarikashram & Shardamath-Dwarka Mahaswami Swaroopanand Saraswatiji Maharaj also will have no right to alienate said Debutter Property in any manner whatsoever. Relevant extracts of the said judgment read as follows:

"But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the sebait of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring

them. The authority of the sebaite of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice *Knight Bruce*:—

“The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he is shewn to have acted *mala fide*, will not be affected, though it be shewn that with better management the estate might have been kept free from debt.” (See *Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree* 6.)

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as sebaite, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.”

21. In AIR 1953 SUPREME COURT 491 (*Saraswathi Ammal v. Rajagopal Ammal*) the Hon'ble Supreme Court held that 'it is correct to say that what is a religious purpose under the Hindu law must be determined according to Hindu notions. This has been recognised by Courts from very early times.' Relying on said judgment it is submitted that when The Holy Divine Scripture Sri Atharv-ved and The Holy Sacred Scriptures Sri Skand Puran, Sri Narsimh Puran, Srimad Valmiki Ramayana, The Holy Sacred Book Sri Ramcharitmanas says that the persons having faith in those Scriptures must visit and perform customary rituals whereby they will acquire all merit which is acquired by the people by visiting all other sacred places as well as by performing all yajnas etc.; according to Hindu Shastras that place having such excellent divine power itself is a Deity and Juridical entity. Relevant paragraph 6 of the said judgment reads as follows:

“6. It was held in the Madras decisions above noticed that the building of a Samadhi or a tomb over the remains of a person and the making of provision for the purpose of a gurupooja and other ceremonies in connection with the same cannot be recognised as charitable or religious

purpose according to Hindu law. This is not on the ground that such a dedication is for a superstitious use and hence invalid. Indeed the law of superstitions uses as such has no application to India, The ground of the Madras decisions is that a trust of the kind can claim exemption from the rule against perpetuity only if it is for a religious and charitable purpose recognised as such by Hindu law and that Hindu law does not recognise dedication for a tomb as a religious or charitable purpose. It is, however, strenuously argued by the learned counsel for the appellants that the perpetual dedication of property in the present case as in the Madras cases above referred to, must be taken to have been made under the belief that it is productive of spiritual benefit to the deceased and as being somewhat analogous to worship of ancestors at a *sradh*.

It is urged, therefore, that they are for religious purposes and hence valid. The following passage in Mayne's Hindu Law, Edn. 11, at p. 192, is relied on to show that

"What are purely religious purposes and what religious purposes will be charitable must be entirely decided according to 'Hindu law and Hindu notions.'"

It is urged that whether or not such worship was originally part of Hindu religion, this -practice has now grown up and with it the belief in the spiritual efficacy thereof and that Courts cannot refuse to accord recognition to the same or embark on an enquiry as to the truth of any such religious belief, provided it is not contrary to law or morality. It is further urged that unlike in English law, the element of actual or assumed public benefit is not the determining factor as to what is a religious purpose under the Hindu law,

Now, it is correct to say that what is a religious purpose under the Hindu law must be determined according to Hindu notions. This has been recognised by Courts from very early times, Vide *Fatma Bibi v. Advocate-General of Bombay*, 6 Bom 42 (D). It cannot also be disputed that under the Hindu law religious or charitable purposes are not confined to purposes which are productive of actual or assumed public benefit. The acquisition of religious merit is also an important criterion. This is illustrated by the series of cases which recognise the validity of perpetual endowment for the maintenance and worship of family idols or for the continued performance of annual *sradhs* of an individual and his ancestors. See - *Dwarkanath Bysack v. Burroda Persaud Eysack*, 4Ca1443 (E) and - *Rupa Jagasheti v. Krishnaji*, 9 Bom 169 (F). So far as the textual Hindu law is concerned what acts conduce to religious merit and justify a perpetual dedication of property therefore, is fairly definite. As stated by the learned author Prananath Saraswathi on the Hindu Law of Endowments at Page 18-

"From very ancient times the sacred writings of the Hindus divided works productive of religious merit into two divisions named '*ishta*' and '*purtta*', a classification which has come down to our own times. So much so that the entire object of Hindu endowments will be found included within the enumeration of '*ishta*' and '*purtta*'."

The learned author enumerates what are 'ishta works at pages 20 and 21 and what are purtta' works at page 27. This has been adopted by later learned authors on the law of Hindu Religious Endowments and accepted by Subrahmanya Ayyar J., in his judgment in—'Parthasarathy Pillai v. Thiruvengada Pillai', 30 Mad 340 at p. 342 (G). These lists are no doubt not exhaustive but they indicate that what conduces to religious merit in Hindu law is primarily a matter of Shastraic injunction. To the extent, therefore, that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a Shastraic basis so far as Hindus are concerned. No doubt since then other religious practices and beliefs may have grown up and obtained recognition from certain classes, as constituting purpose conducive to religious merit. If such beliefs are to be accepted by Courts as being sufficient to valid perpetual dedication of property therefor without the element of actual or presumed public benefit it must at least be shown that they have obtained wide recognition and constitute the religious practice of a substantial and large class of persons. That is a question which does not arise for direct decision in this case. But it cannot be maintained that the belief in this behalf of one or more individuals is sufficient to enable them to make a valid settlement permanently tying up property. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society."

22. In AIR 1952 SUPREME COURT 245 (*Nar Hari Shastri v. Badrinath Temple Committee*) it has been held that Yajman's right of entering in the Temple along with pandas is a legal right. Relying on said judgment it is submitted that as Hindus use to worship in temple aided by their respective Pandas since time immemorial, the fact that Brahmin Pandas presence which was noticed by William Finch during his visit (in between 1606-1611 A.D.) to Sri Ramjanamsthan proves it beyond doubt that even during the reign of Emperor Jahangir, the Great Grandson of the Emperor Babur said Hindu-shrine was existing. Relevant paragraph 21, 22 and 32 of the said Judgment read as follows:

"21. This right of entry into a public Temple is, however, not an unregulated or unrestricted right. It is open to the trustees of a public Temple to regulate the time of public visits and fix certain hours of the day during which alone members of the public would be allowed access to the shrine. The public may also be denied access to certain particularly sacred parts of the Temple, e. g., the inner sanctuary or as it is said the 'Holy of Holies' where the deity is actually located. Quite apart from these, it is always competent to the Temple authorities to make and enforce rules to ensure good order and decency of worship and prevent overcrowding in a Temple. Good conduct or orderly behaviour is always an obligatory condition of admission into a Temple, vide *KALIDAS JIVRAM v. GOR PARJARAM*, 15 Bom 309; *THACKERSAY v. HAR BHUM*, 8 Bom 432, and this principle has been accepted by and recognised in the Shri Badrinath Temple Act, S. 25 of which provides for framing of bye-laws by the Temple Committee 'inter alia'

for maintenance of order inside the Temple and regulating the entry of persons within it: vide S.25 (1) (m).

22. The true position, therefore, is that the plaintiffs' right of entering the Temple along with their yajmans is not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the Temple authorities; it is a legal right in the true sense of the expression but it can be exercised subject to the restrictions which the Temple committee may impose in good faith for maintenance of order and decorum within the Temple and for ensuring proper performance of customary worship. In our opinion, the plaintiffs are entitled to a declaration in this form.

32. The appeal is thus allowed only in part. The plaintiffs shall have a declaration that they are entitled to accompany their Yajmans inside the temple subject to any bye-law or rule made by the Committee in proper exercise of their powers under S. 25 of the Sri Badrinath Temple Act. the other prayer of the plaintiffs is rejected."

23. In AIR 1957 Alld. 743 (*B. Jangi Lal v. B. Panna Lal & Anr.*) the Hon'ble Allahabad High Court held that in a case where the existence of a trust in favour of the idol is itself denied, or the physical location of the idol at a certain place is sought to be altered or challenged by the parties to implead the idol as a party is necessary. Relying on said judgment, it is humbly submitted that as in the instant case existence of the endowed property that is Shri Ramjanamsthan has been put into question and removal of the idol of the Lord of Universe, Shri Ramlala itself has been prayed for which will result into extinction of existence if Shri Ramlala and his said endowment he is necessary party and without impleading him as a party defendant, no decree can be passed as prayed for in the instant suit. As such the suit is liable to be dismissed on this ground alone. Relevant paragraph No.5 of the said judgment reads as follows:

"(5) Having heard the learned counsel for the parties we are of opinion that this appeal should be allowed. We find it difficult to hold that a suit can only be brought by the idol alone, and no one else. We are of opinion that the acceptance of such a view would result in the creating of difficulties in the way of the preservation of the interest of the idol itself. Whether an idol is a necessary party to a suit or not would in our opinion, depend on the facts and circumstances of each particular case. It might be that where the interests of the idol are directly affected or its own existences seriously imperilled, the appearance of the idol before the Court might be necessary.

This might be so, for example in a case where the existence of a trust in favour of the idol itself denied, or the physical location of the idol at a certain place is sought to be altered or challenged by the parties. There might be other cases also where the Court considering the circumstances of the case, might feel that it is necessary to implead the idol. In such a case, it is open to the Court to implead the idol. In such case, where the existence of a trust in favour of the idol is admitted by the parties, and a serious charge is levelled against the acting shebait, it would not be justifiable to dismiss the suit of the

plaintiff altogether on the ground that a case against the acting shebait can be brought by the idol alone. We have to remember in this connection that the idol itself is incapable of acting in a Court of Law.

It can act only through a human agency, and the human agency through which the idol normally acts is its own manager or shebait. In the present case charges of a grave nature are levelled against the manager himself and it is not expected that such a manager would bring a suit for his own removal. In such a case, we see no reason why any person who is interested in the waqf should not be allowed to bring a suit. In the present case it cannot be said that the plaintiff has no such interest as would not be enough to enable him to sustain a suit in a Court of Law from his own behalf. The plaintiff in the present case is admittedly a descendant of the elder branch, being the grandson of the founder of the trust.

He belongs to the family for whose worship the idol was created, and he has a right to worship the idol. He has, therefore, also a right to see that the idol, which is the object of his worship, is properly maintained and preserved. And the property which is dedicated for its preservation and maintenance is not diverted to other purposes. Apart from this direct and present interest which he has, the plaintiff has also a future interest in the office of the managership of the waqf as a prospective shebait. He is not a stranger to the family, and has as much interest in seeing that the objects of the waqf are properly carried out as any other member of the family."

24. In A.I.R. 1953 Bombay 38, *Shree Mahadoba Devasthan v. Mahadba Romaji Bidkar and others*, the Hon'ble Bombay High Court held that the Idol as a Juridical person has a right by virtue of its holding the property to file a suit in regard thereto and if suit is filed in the name of the Idol it would have to be represented by its manager or shebait. In the absence of the manager or shebait, it would be competent to another person even the beneficiary apart from his being the next in succession to the office of the shebait to file a suit in the name of the Idol acting as next friend. The next friend would of necessity be some person other than the shebait of the Idol, and no better person can ever be found than the person next in order of succession of the shebaitship. Relying on said proposition of law it is humbly submitted that the patron of the Akhil Bhartiya Sri Ram Janam Bhoomi Punarudhar Samity represented by its convenor, the defendant no.20 is His Majesty & Holiness Jagadguru Shankaracharya Jyotirmath Badarikashram and Shardamath Dwarka Mahaswami Sri Swaroopanand Saraswati ji Maharaj and by virtue of Mathamnaya Mahanushasanam, a Smriti compiled by Bhagwatpad Srimad Jagadguru Adi Shankaracharya, an incarnation of Lord Shiv; said Jagadguru Shankaracharya of Jyotirmath is ex-officio Dharmacharya of the Lord of Universe Sri Narayan installed in Sri Badrinath Temple in the district of Chamoli within the State of Uttarakhand and Dharmasamrat of Northern Bharat having territorial religious jurisdiction over the region including the Ayodhya said Jagadguru Shankaracharya is the ex-officio superior-shebait and protector of all the temples and Idols located in this region as such the Lord of Universe Sri Ram was required to be made party in the instant suit through his ex-

officio superior shebait said Jagadguru Shankaracharya of Jyotirmath Badarikashram for want of which instant suit is liable to be dismissed. Relevant extract from the said Judgment reads as follows:

"[3]Normally speaking, a manager or an agent would not be competent to file a suit in his own name in regard to the affairs of his principal and such a suit even if brought by the manager would have to be in the name of the principal. The principal in the case of an image or idol is not an entity capable of acting on its own, with the result that it has of necessity got to act through its manager or an accredited agent, who under the circumstances is the only person capable of performing these functions in the name of the idol. The shebait is in possession and management of the property belonging to the image or idol, and having such possession and management vested in him, it is only an extension of the principle of responsibility from the image or idol to the manager, or to use the other words, from the principal to the agent to vest the right of protection of the property which is incidental to the right of possession and management thereof by way of filing a suit in connection with same, in the shebait. The extension of the right in the shebait however does not mean that the right which the image or the idol as a juridical person has by virtue of its holding the property to file a suit in regard thereto is by any process eliminated. Both these rights can exist simultaneously, so that if the suit is filed in the name of the image or idol, the image or the idol would be a proper plaintiff, though, as observed before, of necessity it would have to be represented in the suit by its manager or shebait. If the manager or the shebait on the other hand chooses in vindication of his right to sue for the protection of the properties to file a suit in his own name, he may just as well do so. But that would be no bar to the right of the image or the idol to file such a suit if it had chosen to do so. Of course these rights either by the image or the idol or by the manager or by the shebait could be exercised only by the one or the other and not by both; so that if the cause of action was prosecuted to judgment, it would be merged in a decree properly passed in favour of the plaintiff and the defendant could not be proceeded against any more in respect of that very cause of action. We are, therefore, of the opinion that the suit was properly filed in the name of Shri Mahadoba Devasthan the image or idol by its vahivatdar Keshav Waman Waghule. It was, however, urged by Mr. Chandrachud that Keshav Waman Waghule was not in fact the vahivatdar. The vahivatdar for the time being was his father Waman Chimnaji Waghule, original defendant 3. Normally speaking again this would be the correct position and we have the analogy of suits filed on behalf of the minors and lunatics by their next friends. Where there is a testamentary guardian or a certificated guardian, nobody except such guardian could be the next friend of a minor plaintiff. But if the interest of that guardian were adverse to those of the minor, he certainly could not be appointed the next friend for the purpose of the suit. Applying that analogy so far it is possible to do so in the circumstances of the present case, no Court would appoint the manager or the shebait who was himself a party to an

unauthorised alienation as the next friend of the image or the idol where the alienation was being challenged. The next friend would, of necessity, be some person other than the manager or the shebait of the image or the idol, and what better person could ever be found than the person next in order of succession of the shebaitship? In the case before us, Waman Chimnaji Waghule was the person who was alleged to have unauthorisedly alienated some of the suit properties. He could certainly not be appointed the next friend of the plaintiff for the purpose of instituting and prosecuting this suit. Keshav Waman Waghule, the son of original defendant 3, was the next vahivatdar after Waman Chimnaji Waghule. It was therefore in the fitness of things that he acted as the next friend of the plaintiff in the matter of the institution and prosecution of this suit

(ibid p. 40).

25. Relevant portion from the "Matamnaya Setu Or Mahanusasanam" of Srimad Jagadguru Adi Sankaracarya along with Sarda Bhasyam of Shri Parmeshwar Nath Mishra, Advocate, High Court Calcutta and Supreme Court of India, Published by Shankaracharya Memorial Trust, Dwarka, 2001 Edition reads as follows:

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iii

"MATHAMNAYA SETU MAHANUSHASANAM IS AN AUTHORITY

Hon'ble High Court at Patna vide its judgement dated 19th November 1936 passed in appeal arising out of Original Decree No. 3 of 1931, Chief Justice Courtney Terrell; held that – "The trust in question is that of the Goverdhan Mutt at Puri. This trust was founded as one of four similar trust by a great Hindu religious leader in ancient time with object amongst others of combating the spread of Buddhism."

"The Founder Adi Shankaracharya divided India into four jurisdictions with a Math at the head of each. Under the Western Jurisdiction was placed the territory roughly corresponding to that now know as the Bombay Presidency called the Sarada Mutt at Dwarka..... Northern India was placed under the Jyotir Math which is now extinct, Eastern India was placed under the Goverdhan Mutt, the subject of the present dispute, and Southern India under the Srigneri Matt in Mysore. We are told that the founder and the Math founded by him are objects of profound veneration of by all sections of pious Hindu. The head of each Math is known by the title of Jagadguru Shankaracharya and his religious authority is widely, if not universally, accepted". (Srimajjagadguru Shankar Math Vimarsh, Edited by Sri Rajgopal Sharma, 1963 Edn, page 636 & 637).

"..... The Scriptures which govern the fundamental doctrines and origin of the four Mutts are known as Mathamnaya but it is said that this document is really of the eighth century and not of an earlier dated which is attributed to it by tradition. The Mathamnaya is, however, accepted as authoritative by Hindus" (ibid page 134 & 135).

The name of the third Shruti receptacle in the North is 'Jyotirmath'. Shree Math is its other names.(18)

Realm is Badarikashram God is Narayan, Goddess is Purnagiri and (first) Acharya is Totak (20)

(Celibate is) Speaker of the Atharvveda, Gotra is Bhrigu; Kuru, Kashmir, Kamboj, Panchal divisions etc. situated in the Northern direction are the territories under the Jyotirmath. (22)

Mathamnaya Setu page-(10)

These distinct definitions and injunctions with regard to the four Monasteries on the basis of which Acharyas are installed in hereditary descent, must be properly known.(38)

Aforesaid Revelation receptacles, for the complete renouncers of the extreme stages i.e. who have crossed all four stages of life have been severally stated, on all those four Acharyas have been appointed according to their seizure of prescribed qualifications for ascending on the aforesaid Monasteries.(39)

(ibid page - 16)

Within their territorial jurisdiction they should yoke the people who are acting otherwise with their own Dharma and constantly rove on the surface of the earth.(40)

People who had acquired contrary conduct, under the righteous command of the Acharya should duly practise their own Dharma uninterruptedly.(41)

Monastery should not be fixed as permanent residence of the Acharya. For the stability of their own respective Empires they should facilitate transmission. (42)

(ibid page -17)

Righteous-conduct of Varnashram accomplished by us (i.e. Myself and other Predecessor omniscient Lords) should be always protected in their respective apportionments according to our commandments. (43)

Where great-loss of this (Varnashram) Dharma is caused there Acharya should give up lethargy and take resort of quick action.(44)

(ibid page-18)

A highly esteemed Samnyasi may acquire power of the four seats but he should utilise them separately in accordance with distinct law made by me, the omniscient Lord.(47)

(ibid page-20)

Excellent renouncer endowed with aforesaid Supreme knowledge ascended on my Seat should be fully known as 'He is I' i.e. Shankar (in this respect)' Yasya Dev' Shruit is testimony.(51)

(ibid page-34)

This Majesty has been bestowed upon reigning omniscient only for the purpose of Dharma and (they should) act like lotus leaf in water for the purpose of benevolence. (54)

(ibid page-38)

As for the sake of land kings are entitled for tax from the people, similarly for the sake of Dharma the Acharyas, who have been duly

installed and conferred with power in accordance with prescribed law are entitled for the same.(57)Foundation of Human-beings is Dharma and it depends on Acharya therefore rule of excellent Self luminous i.e. Acharya, the follower of Acharya Shankar or Shankaracharya is above all.(58)

(ibid page-40)

Human beings after committing sins become pure on suffering the punishment awarded by the Acharya and attain heaven like virtuous men.(60)

(ibid Page-41)

It has been told by Manu as also by Gautam Specifically that conduct of the Excellent personality whose conducts are commanding in nature, is also known as Dharma like its Source i.e. Vedas.(61)

(ibid page-42)

In the Satyayug Brahma, Treayug Rishi Sattam and Dwaperyug Vyas werer Spiritual Master of the world, here in Kali. 'I am'. (64)

(ibid page-44)

Distinction of Four Monasteries and Four yoked Acharyas as well as Four denominations, is desired Dharma.(65)

(ibid page-47)

PART - XXXVII

THE HINDUS HAVE SUPERIOR FUNDAMENTAL RIGHT THAN THE MUSLIMS UNDER ARTICLES 25 & 26 OF THE CONSTITUTION OF INDIA FOR THE REASONS THAT PERFORMING CUSTOMARY RITUALS AND OFFERING SERVICE WORSHIP TO THE LORD OF UNIVERSE TO ACQUIRE MERIT AND TO GET SALVATION AS SUCH IT IS INTEGRAL PART OF HINDU DHARMA & RELIGION IN VIEW WHEREOF IT IS HUMBLY SUBMITTED THAT THE INSTANT SUIT IS LIABLE TO BE DISMISSED WITH EXEMPLARY COST:

1. In (1998) 8 SCC 296 (*Mr. 'X' v. Hospital 'Z'*) the Hon'ble Supreme Court held that where there is a clash of two Fundamental Rights, the Right which would advance the public morality or public interest would alone be enforced through the process of Court. In other words the superior Fundamental Right would prevail. Relying on said judgment it is submitted that the pilgrimage, service and worship as well as performance of customary rituals at Sri Ramjanamsthan which has been described as Babri Mosque in the plaint is integral part of Hinduism as it has been commanded by the Holy Divine Scripture Sri Atharv Ved, the Holy Sacred Scripture Sri Skand Puran & Sri Narsimh Puran, Sri Valmiki Ramayana, The Sacred Religious Book Sri Ramacharitamansa that the persons must visit the birth place of the Lord of Universe Sri Ram and by doing so they will acquire merit of visiting all the sacred places, performing of all yajnas (sacrifice) and gifting of thousands of cows etc. as also they will get salvation. But in no sacred holy books of Islam it has been mentioned that offering prayer at the birth place of Sri Ram which has been described as Babri Mosque in the plaint is integral part of Islam. As such the Hindus have superior Fundamental Right to enforce through this Hon'ble Court and the instant suit is liable to be dismissed as *Sthandil* of Sri Ram which is a deity cannot be declared as mosque otherwise it will infringe Fundamental Rights of the Hindus guaranteed under Article 25 and 26 of the Constitution of India. Relevant paragraph nos.44 and 45 of the said judgment read as follows:

"44. Ms 'Y', with whom the marriage of the appellant was settled, was saved in time by the disclosure of the vital information that the appellant was HIV(+). The disease which is communicable would have been positively communicated to her immediately on the consummation of marriage. As a human being, Ms 'Y' must also enjoy, as she obviously is entitled to, all the Human Rights available to any other human being. This is apart from, and in addition to, the Fundamental Right available to her under Article 21, which, as we have seen, guarantees "right to life" to every citizen of this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since "right to life" includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant's right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her Fundamental Right under Article 21,

the ~~310~~ right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day". (See: Allen: *Legal Duties*)

45. "AIDS" is the product of undisciplined sexual impulse. This impulse, being a notorious human failing if not disciplined, can afflict and overtake anyone howsoever high or, for that matter, how low he may be in the social strata. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have a bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some American decisions. (See: *School Board of Nassau Country, Florida v. Airline*⁸; *Chalk v. USDC CD of Cal.*⁹; *Shuttleworth v. Broward Cty.*¹⁰; *Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne*¹¹. But "sex" with them or the possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object."

2. In (1994) 6 SCC 360 (*M. Ismail Faruqui (Dr.) v. Union of India*) the Hon'ble Supreme Court has held that the Right to Practise, Profess and Propagate Religion guaranteed under Article 25 of the Constitution does not extend to the Right of Worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution of India. The protection under Articles 25 and 26 is to religious practice which forms integral part of practice of that religion. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance of that religion to make it an essential or integral part of the religion stand on a different footing and have to be treated differently and more reverentially. Relying on said judgment it is submitted that Sri Ramjanamsthan has particular significance for the Hinduism as visiting and performing customary rites confer merit and gives salvation it is firm belief of the Hindus based on their sacred Divine Holy Scriptures which belief neither can be scrutinized by any Court of Law nor can be challenged by the persons having no faith in Hinduism as this is conscience of the Hindus having special protection under Article 25 of the Constitution of India. Relevant paragraph 77 and 78 of the said judgment read as follows:


77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right

of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

3. In *M. Ismail Faruqui (Dr.) v. Union of India (supra)* the Hon'ble Supreme Court held that a mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered any where even in open. The Right to Worship is not at any and every place so long as it can be practised effectively, unless the Right to Worship at a particular place is itself an integral part of that right. Relying on said ratio of law it is submitted that without offering prayer at Sri Ramjanamsthan described as Babri mosque in the plaint it can be practised somewhere else but offering prayer in stead of Sri Ramjanamsthan at any other place cannot be practised because the merit which is obtained by worshipping at the birth place of Sri Ram cannot be obtained by doing so at other places and it will be contrary to the holy Divine Sacred Scripture of the Hindus and will cause extinction of a most sacred shrine of the Hindus. Relevant paragraph nos.80 to 87 of the said judgment read as follows:

"80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property.


81. Section 3(26) of the General Clauses Act comprehends the categories of properties known to Indian Law. Article 367 of the Constitution adopts 418 this secular concept of property for purposes of our Constitution. A temple, church or mosque etc. are essentially immovable properties and subject to protection under Articles 25 and 26. Every immovable property is liable to be acquired. Viewed in the proper perspective, a mosque does not enjoy any additional protection which is not available to religious places of worship of other religions.

82. The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See *Mulla's Principles of Mahomedan Law*, 19th Edn., by M. Hidayatullah — Section 217; and *Shahid Ganj v. Shiromani Gurdwara* 313). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative power of the State. A mosque is not an essential part of the practice of the religion of Islam and *namaz* (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right.

Maintainability of the Reference

83. In the view that we have taken on the question of validity of the statute (Act No. 33 of 1993) and as a result of upholding the validity of the entire statute, except Section 4(3) thereof, resulting in revival of the pending suits and legal proceedings wherein the dispute between the parties has to be adjudicated, the Reference made under Article 143(1) becomes superfluous and unnecessary. For this reason, it is unnecessary for us to examine the merits of the submissions made on the maintainability of this Reference. We, accordingly, very respectfully decline to answer the Reference and return the same.

Result

84. The result is that all the pending suits and legal proceedings stand revived, and they shall be proceeded with, and decided, in accordance with  419 law. It follows further as a result of the remaining enactment being upheld as valid that the disputed area has vested in the Central Government as a statutory receiver with a duty to manage and administer it in the manner provided in the Act maintaining status quo therein by virtue of the freeze enacted in Section 7(2); and the Central Government would exercise its power of vesting that property further in another authority or body or trust in accordance with Section 8(1) of the Act in terms of the final adjudication in the pending suits. The

power of the courts in the pending legal proceedings to give directions to the Central Government as a statutory receiver would be circumscribed and limited to the extent of the area left open by the provisions of the Act. The Central Government would be bound to take all necessary steps to implement the decision in the suits and other legal proceedings and to hand over the disputed area to the party found entitled to the same on the final adjudication made in the suits. The parties to the suits would be entitled to amend their pleadings suitably in the light of our decision.

85. Before we end, we would like to indicate the consequence if the entire Act had been held to be invalid and then we had declined to answer the Reference on that conclusion. It would then result in revival of the abated suits along with all the interim orders made therein. It would also then result automatically in revival of the worship of the idols by Hindu devotees, which too has been stopped from December 1992 with all its ramifications without granting any benefit to the Muslim community whose practice of worship in the mosque (demolished on 6-12-1992) had come to a stop, for whatever reason, since at least December 1949. This situation, unless altered subsequently by any court order in the revived suits, would, therefore, continue during the pendency of the litigation. This result could be no solace to the Muslims whose feelings of hurt as a result of the demolition of mosque, must be assuaged in the manner best possible without giving cause for any legitimate grievance to the other community leading to the possibility of reigniting communal passions detrimental to the spirit of communal harmony in a secular State.

86. The best solution in the circumstances, on revival of suits is, therefore, to maintain status quo as on 7-1-1993 when the law came into force modifying the interim orders in the suits to that extent by curtailing the practice of worship by Hindus in the disputed area to the extent it stands reduced under the Act instead of conferring on them the larger right available under the court orders till intervention was made by legislation.

87. Section 7(2) achieves this purpose by freezing the interim arrangement for worship by Hindu devotees reduced to this extent and curtails the larger right they enjoyed under the court orders, ensuring that it cannot be enlarged till final adjudication of the dispute and consequent transfer of the disputed area to the party found entitled to the same. This being the purpose and true effect of Section 7(2), it promotes and strengthens the commitment of the nation to secularism instead of negating it. To hold this provision as anti-secular and slanted in favour of the Hindu community ~~§~~420 would be to frustrate an attempt to thwart anti-secularism and unwittingly support the forces which were responsible for the events of 6-12-1992."

4. AIR 1966 SUPREME COURT 1119 "Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya" a constitution Bench of the Hon'ble Supreme Court of India inferred that according to Hindu Dharma the ultimate goal of humanity is the release and freedom from the unceasing cycle of births and rebirths;

Moksha or Nirvana, which is the ultimate aim of Hindu religion and philosophy, represents the state of absolute absorption and assimilation of the individual soul with the infinite. 'Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion'. This definition brings out succinctly the broad distinctive features of Hindu religion. Relying on said judgment it is respectfully submitted that as according to the Holy Devine Srimad Atharv-Ved, Sri Skand Puran, Sri Narsimh Puran, Sri Valmiki Ramayan, Sri Ram-charitmanas etc. a Hindu gets salvation on visiting and having a look of *Sthandil / Site* of 'Sri Ramjanamsthan' in Ayodhya as well as by performing customary rituals thereon, pilgrimage to said most holiest place and performing service and worship thereon is integral part of Hinduism guaranteed under Articles 25 and 26 of the Constitution of India deprivation wherefrom would amount to infringement of Fundamental right of freedom of religion of the Hindus and extinction of sacred place of Hindus which is easiest means of ultimate end of salvation for the Hindus. Relevant paragraph 39-41 of the said judgment reads as follows:

39. Whilst we are dealing with this broad and comprehensive aspect of Hindu religion, it may be permissible to enquire what, according to this religion, is the ultimate goal of humanity? It is the release and freedom from the unceasing cycle of births and rebirths; Moksha or Nirvana, which is the ultimate aim of Hindu religion and philosophy, represents the state of absolute absorption and assimilation of the individual soul with the infinite. What are the means to attain this end? On this vital issue, there is great divergence of views; some emphasise the importance of Gyan or knowledge, while others extol the virtues of Bhakti or devotion; and yet others insist upon the paramount importance of the performance of duties with a heart full of devotion and mind inspired by true knowledge. In this sphere again, there is diversity of opinion, though all are agreed about the ultimate goal. Therefore, it would be inappropriate to apply the traditional tests in determining the extent of the jurisdiction of Hindu religion. It can be safely described as a way of life based on certain basic concepts to which we have already referred.

40. Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion and he evolved a working formula which may be regarded as fairly adequate and satisfactory. Said Tilak: "Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion(11-A)". This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: "When we pass from the plane of social practice to the plane of intellectual outlook. Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim

religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary (12)*”

(11-A)

B. G. Tilak's *Gitarahasaya*”.

* (12) “The Present day experiment in Western Civilisation” by Toynbee, page 46-49.

41. The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Art. 25 has made it clear that in sub-clause (b) of clause. (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

5. In AIR 1996 SUPREME COURT 1765 = (1996) 9 SCC 548 “A. S. Narayana Deekshitulu v. State of A.P.” the Hon’ble Supreme Court held that a religion undoubtedly has its basis in a system of belief and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being; and religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence - factual or legislative or historic - presented in that context is required to be considered and a decision reached. Relying on said judgment it is submitted that performing customary rituals and service worship at Sri Ramajanamasthan is integral part of Hindus religious practices but offering prayer on that sacred place is not integral part of Islam. Relevant paragraph 89-91 of the said judgment reads as follows:

“89. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principle regulate the lives of men believing in that theistic, conscience or religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amenity, fraternity and equality of all persons which find their foothold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a

religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice.

90. In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc, even among Hindus, different denominates and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be pre-dominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class of persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice. That is far from saying that it is not possible to State with reasonable certainty the limits within which the Constitution conferred a right to profess religion. Therefore, the right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right to propagating religion which is subject to legislation by the State limiting or regulating any activity - economic, financial, political or secular which are associated with religious belief, faith, practice or custom. They are subject to reform on social welfare by appropriate legislation by the State. Though religious practices and performances of acts pursuant of religious belief are as much a part of religion as faith or belief in a particular doctrine, that by itself is not conclusive or decisive. What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence - factual or legislative or historic - presented in that context is required to be considered and a decision reached.

93. The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his Cosmos, Creator and realise his spiritual self. Sometimes, practices religious or secular, are intricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of ancient

Samriti, human actions from birth to death and most of the individual actions from day to day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One, hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity. Law is a social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his "Judicial Process," life is not a logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination shall be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired. There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the legislature gets it from experience and study and reflection in proof from life itself. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentially is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the Court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or a secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the question. Whether hereditary archaka is an essential and integral part of the Hindu religion is the crucial question?

6. In AIR 1996 SUPREME COURT 1765 = (1996) 9 SCC 548 "A. S. Narayana Deekshitulu v. State of A.P." the Hon'ble Supreme Court distinguished between Dharma and religion stating that that the Hindu Dharma is eternal and since

time immemorial. Relying on said judgment it is submitted that as the Lord of Sri Ram any protector of Dharma and has shown path of Dharma to the mankind, His Place of Birth has special significance for the Hindus and it is not only part of religious practices but the epicenter of the Hindu Dharma. Relevant paragraph nos. 143 to 148 of the said judgment read as follows:

“ 143. Very often the words “religion” and the same concept or notion; to put it differently, they are used inter-changeably. This, however, is not so, as would become apparent from what is being stated later, regarding our concept of dharma. I am of the considered view that the word religion in the two articles has really been used, not as colloquially understood by the word religion, but in the sense of it comprehendign our concept of dharma. The English language having had no parallel word to dharma, the word religion was used in these two articles. it is a diferent matter that the word dharma has now been accepted even in English language, as would appear from Webster’s New Collegiate Dictionary which has defined it to mean : Dharma : n (Skt. fr. dharayati he holds:) akin to L firmus firm : custom or law regarded as duty : he basic principles of cosmic or individual existence : nature : conformity to one’s duty and nature”. The Oxford Dictionary to one’s duty and nature”,. The Oxford Dictionary defines dharma as : “Right behaviour, virtue; the law (Skt. a decree, custom)”.

144. The difference between religion and dharma is eloquently manifested when it is remembered that this Court’s precept is

It is apparent that the word dharma in this canon or, for that matter, in our saying :

,does not emean religion, but the same hjas been used in the sense defined in the sense defined in the aforesaid two dictionaties. This is how the President of India, Dr. Shanker Dayal Sharma, underestood the word dharma in his address at the First Convocation of the National Law School of India Unversity delivered on 25th Septmeber, 1993 at Bangalore.

145. Our dharma is said to be ‘Sanatana’ i. e. one which has eternal values: one which is neither time-bound nor space-bound. It is because of this that RgVeda has referred to the existence ‘Sanatan Dharmani’. The concept of ‘dharma’, therefore, hass been with us for time immemorial. The word is derived from the root ‘Dh. r’ - which denotes : ‘upholding’, supporting’, nourishing’ and sustaining’, It is because of this that in Karna Parva of the Mahabharata, Verse- 58 in Chapeter 69 says :

“Dharma is for the stability of the society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfilment of these object is Dharma; that is definite.”

(This is the English translaltion of the Verse) as finding place in the aforesaid Convocation Address by Dr. Shanker Dayal Sharma.)

146. The Brhadaranyakopanisad identified Dharma with Truth, and declared its supreme status thus :

“ There is nothing higher than dharma. Even a very weak man hopes to prevail over a very strong man on the strength of dharma, just as (he prevails over a wrong-doer) with the help of the King. So what is called Dharma is really Truth. Therefore people say about a man who declares the truth that he is declaring dharma and about one who declares dharma they say he speaks the truth. These two (dharma and truth) are this.”

(English translation of the original text as given in the aforesaid convocation address).

147. The essential aspect of our ancient thought concerning law was the clear recognition of the supremacy of dharma and the clear articulation of the status of ‘dharma’, which is somewhat akin to the modern concept of the rule of law. i. e. of all being sustained and regulated by it.

148. In Verse- 9 of Chapter-5 in the Ashrama Vasika Parva of the Mahabharata, dhritrashtra states to Yudhishthira : “the State can only be preserved by dharma- under the rule of law.”

7. AIR 1982 SUPREME COURT 1107 “K. Rajendran v. State of T.N.” the Hon’ble Supreme Court has quoted the statement of the Lord of Universe Sri Rama from the Ramayana depicting the attitude of an Indian ruler as an authority. From said judgments it becomes crystal clear that even a statement of the Lord of Sri Rama has greatest value for the Hindus as such the religious value of His Birth place is beyond description. Relevant paragraph 49 of the said judgment reads as follows:

“49. The nature of the relationship that exists or ought to exist between the Government and the people in India is different from the relationship between the ruler and his subjects in the West. A study of the history of the fight for liberty that has been going on in the West shows that it has been a continuous agitation of the subjects for more and more freedom from a king or the ruler who had once acquired complete control over the destinies of his subjects. The Indian tradition or history is entirely different. The attitude of an Indian ruler is depicted in the statement of Sri Rama in the Ramayana thus :

.....

(Ramayana III-10-3)

(Kshatriyas (the kings) bear the bow (wield the power) in order to see that there is no cry of distress (from any quarter)).”

8. AIR 1998 SUPREME COURT 3164 = (1998) 7 SCC 392 “State of Gujarat v. Hon’ble High Court of Gujarat” the Hon’ble Supreme court has observed that the world would have been poorer without the great epic “Ramayana”. From the said judgment it becomes clear that each and every thing connected with the Lord of Universe is of great value to the Hindus and extinction of the most holiest shrine *Sri Ramajanamsthan* will deprive the Hindus from acquiring unparalleled merit and salvation which can be obtained only by visiting the said sacred shrine and performing customary ritual there. Relevant paragraph 31 of the said judgment reads as follows:

“31. It is a grand transformation recorded in the epics that the hunter Valmiki turned out to be a poet of eternal recognition. If the powers which brought about that transformation had remained inactive the world would have been poorer without the great epic “Ramayana”. History is replete with instances of bad persons transforming into men of great usefulness to humanity. The causes which would have influenced such swing may be of various kinds. Forces which condemn a prisoner and consign him to the cell as a case of irredeemable character belong to the pessimistic society which lacks the vision to see the innate good in man.”

9. In AIR 1954 SUPREME COURT 282 “Commr., Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt” the Hon’ble Supreme court held that a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it will not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress. The guarantee under the Constitution of India not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression “practice of religion” in Art. 25. Relying on said judgment it is submitted that performing customary rites at Sri Ramajanasthan is integral part of religions practices of the Hindus as Hindus believe that therein there is invisible power of the Lord of Universe Sri Ram who confers merit on devotees and gives them salvation as such said practice is integral part of Hindu Dharma & Religion and is protected under Article 25 & 26 of the constitution of India. Relevant paragraph nos. 17, 18 and 19 of the said judgment read as follows:

“17. It will be seen that besides the right to manage its own affairs in matters of religion which is given by cl. (b), the next two clauses of Art. 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no Legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which cl. (b) of the Article applies.

What then are matters of religion? The word “religion” has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case — ‘Vide Davis v. Beason’, (1888) 133 US 333 at p. 342 (G), it has been said :

“that the term ‘religion’ has reference to one’s views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with ‘cultus’ of form or worship of a particular sect, but is distinguishable from the latter.”

We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Art 44(2), Constitution of Eire and we have great doubt whether a definition of 'religion' as given above could have been in the minds of our Constitution-makers when they framed the Constitution.

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of belief or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

18. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Art. 25. Latham, C. J. of the High Court of Australia while dealing with the provision of S. 116, Australian Constitution which 'inter alia' forbids the Commonwealth to prohibit the 'free exercise of any religion' made the following weighty observations — 'Vide *Adelaide Company v. The Commonwealth*', 67 CLR 116 at p. 127 (H) :

"It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not, interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of S. 116. The Section refers in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the Section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion".

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Arts. 25 and 26 on grounds of public order, morality and health. Clause (2) (a) of Art. 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-cl. (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. The learned Attorney-General lays stress upon cl (2) (a) of the Article and his contention is that all secular activities, which may be associated

with religion but do not really constitute an essential part of it, are amenable to State regulation.

19. The contention formulated in such broad terms cannot, we think be supported, in the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26(b). ...”

10. In AIR 1954 SUPREME COURT 282 “Commr., Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt” the Hon’ble Supreme court held that Under Art. 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters and ; under Art. 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art. 26. Relying on said ratio of law it is submitted that prohibiting the Hindus from performing their customary religious rituals at Sri Ramajanamasthan which has been described as Babari Mosque and not handing over management of the said sacred shrine of the Hindus shall infringe fundamental rights of the Hindus guaranteed under Articles 25 and 26 of the constitution of India. Relevant paragraph 22 of the said judgment reads as follows:

“ 22. It is to be noted that both in the American as well as in the Australian Constitution the right to freedom of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection, An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved.

Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Arts. 25 and 26 is

sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only, it extends to religious practices as well subject to the restrictions which the Constitution itself had laid down. Under Art. 26(b), therefore a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.

Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature, for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Art. 26 (d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law, and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose.

A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under cl. (d) of Art 26.”

11. AIR 2004 SUPREME COURT 2984 = (2004) 12 SCC 770 “Commr. of Police v. Acharya Jagadishwarananda Avadhuta” It is settled law that protection under Articles 25 and 26 of the Constitution of India extend guarantee for rituals and observances, ceremonies and modes of worship which form part and parcel of religion. Practice becomes part of religion only if such practice is found to be essential and integral part. It is only those practices which are integral part of religion that are protected. What would constitute an essential part of religion or religious practice is to be determined with reference to the Doctrine of a particular religion which includes practices which are regarded by the Community as part and parcel of that religion. Test has to be applied by Courts whether a particular religious practice is regarded by the community practising that particular practice is integral part of the religion or not. It is also necessary to decide whether the particular practice is religious in character or not and whether the same can be regarded as an integral or essential part of religion which has to be decided based on evidence. Many symbols have been used in Hindu Literature. Different kinds of symbols and images have different sanctity. Brading of chest, arms and other parts of body represent to the weapons of symbols of Siva. Relying on said judgment it is submitted that being Shartric (Scriptural) command visiting Sri Ramajanamasthan and performing service worship there is integral part of religion of Hindus but it is not integral part of Muslim religion as such instant suit is liable to be dismissed. Relevant paragraph nos. 80 to 86 read as follows:

"80. It would be pertinent to mention that the Sikh Community carry "Kirpans" as a symbol of their religious practice and the Gurkhas the "Kukris" or "Dagger". So also, the Hindus are permitted to carry the idol of "Ganesa" in procession before immersion in the sea during Vinayaka Chaturti Celebrations. Persons professing Islamic Faith are allowed to take out procession during "Moharrum" Festival and persons participating in such processions beat their chest with hands and chains and inflict injuries on them and the same has been permitted as a religious practice of that community.

81. Each deity presides over a certain function, has a certain consort, uses a particular vehicle, giving them a concrete aspect that appeals to less spiritually sophisticated lay people. All these insignia have a deep philosophical symbolism. What might interest us presently is that all these vehicles are mostly drawn from the world of animals, birds, and even reptiles. For example, Brahma has a swan, Vishnu has a garuda, a type of eagle, Siva rides a bull, Ganesa a mouse, Subrahmanya a peacock, and so on. The idea is only to emphasize the kinship with animals. Trees have the divinity Vānadevata. War is presided over by the Goddess Chemundi riding a lion. Sound has a divinity, the Nadabrahmam. The Goddess Saraswathi presides over music and arts. Lakshmi sitting on a lotus deals with wealth. Parvathi, the consort of Siva, rules the entire Nature. All these divinities serve to consecrate every aspect of daily life. The whole pantheon serves to emphasize the one ultimate Reality.

82. Reading and reciting old scriptures, for instance, Ramayana or Quran or Bible or Gurur Granth Sahib is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to a temple, mosque, church or gurudwara. . . .

83. The authorities concerned can step in and take preventive measures in the interest of maintenance of Law and Order if such religious processions disturb Law and Order. It has to be held that the right to carry Trishul, Conch or Skull is an integral and essential part of religious practice and the same is protected under Article 25 of the Constitution of India. However, the same is subject to the right of the State to interfere with the said practice of carrying Trishul, Conch or Skull if such procession creates Law and Order problems requiring intervention of concerned authorities who are entrusted with the duty of maintaining Law and Order.

What is Religion

84. Religion is a social system in the name of God laying down the Code of Conduct for the people in Society. Religion is a way of life in India and it is an unending discovery into unknown world. People living in Society have to follow some sort of religion. It is a social Institution and Society accepts religion in a form which it can easily practice. George Barnard Shaw stated, "There is nothing that people do not believe if only it be presented to them as Science and nothing they will not disbelieve if it is presented to them as Religion." Essentially, Religion is based on "Faith". Some critics say that Religion interfered with Science and Faith. They say that religion led to the growth of

blind faith, magic, sorcery, human sacrifices etc. No doubt, history of religion shows some indications in this direction but both Science and Religion believe in faith. Faith in Religion influences the temperament and attitude of the thinker. Ancient civilization viz., the Indus Valley Civilization shows faith of people in Siva and Sakthi. The period of Indus Valley Civilization was fundamental religion and was as old as at least Egyptian and Mesopotamian Culture. People worship Siva and the Trishul (Trident), the emblem of Siva which was engraved on several seals. People also worshipped stones, trees, animals and Fire. Besides, worship of stones, trees, animals etc. by the primitive religious tribes shows that animism viz., worship of trees, stones, animals was practiced on the strong belief that they were abodes of spirits, good or evil. Modern Hinduism is to some extent includes Indus Valley Civilization Culture and religious faith. Lord Siva is worshipped in the form of Linga. Many symbols have been used in Hindu Literature. Different kinds of symbols and images have different sanctity. Branding of chest, arms and other parts of body represent to the weapons of symbols of Siva. Modern Hinduism has adopted and assimilated various religious beliefs of primitive tribes and people. The process of worship has undergone various changes from time to time.

85. The expression of 'RELIGION' has not been defined in the Constitution and it is incapable of specific and precise definition. Article 25 of the Constitution of India guarantees to every person, freedom of conscience and right freely to profess, practice and propagate religion. No doubt, this right is subject to public order related to health and morality and other provisions relating to Fundamental Right. Religion includes worship, faith and extends to even rituals. Belief in religion is belief of practice a particular faith, to preach and to profess it. Mode of worship is integral part of religion. Forms and observances of religion may extend to matters of Food and Dress. An act done in furtherance to religion is protected. A person believing in a particular religion has to express his belief in such acts which he thinks proper and to propagate his religion. It is settled law that protection under Articles 25 and 26 of the Constitution of India extend guarantee for rituals and rituals and observances, ceremonies and modes of worship which form part and parcel of religion. Practice becomes part of religion only if such practice is found to be essential and integral part. It is only those practices which are integral part of religion that are protected. What would constitute an essential part of religion or religious practice is to be determined with reference to the Doctrine of a particular religion which includes practices which are regarded by the Community as part and parcel of that religion. Test has to be applied by Courts whether a particular religious practice is regarded by the community practising that particular practice is integral part of the religion or not. It is also necessary to decide whether the particular practice is religious in character or not and whether the same can be regarded as an integral or essential part of religion which has to be decided based on evidence.

86. It is not uncommon to find that those delve deep into scriptures to ascertain the character and status of a particular practice. It has been authoritatively laid down that Cow Sacrifice is not an obligatory over-act for a Muslim to exhibit his religious belief. No Fundamental Right can be claimed to insist on slaughter of a healthy cow on a Bakrid Day. Performance of "Shradha" and offering of "Pinda" to ancestors are held to be an integral part of Hindu Religion and religious practice. Carrying "Trishul" or "Trident" and "skull" by a few in procession to be taken out by a particular community following a particular religion is by itself an integral part of religion. When persons following a particular religion carry Trishul, Conch or Skull in a possession, they merely practice which is part of their religion which they wanted to propagate by carrying symbols of their religions such as Trishul, Conch etc. If the conscience of a particular community has treated a particular practice as an integral or essential part of religion, the same is protected by Articles 25 and 26 of the Constitution of India."

12. In AIR 1969 SUPREME COURT 563 "Kamaraju Venkata Krishna Rao v. Sub-Collector, Ongole" the Hon'ble Supreme court held that the entire objects of Hindu endowments will be found included within the enumeration of *Ishta* and *Purta* works. In the Rig Veda *Ishtapurttam* (sacrifices and charities) are described as means of the going to heaven. In commenting on the same passage Sayana explained *Ishtapurtta* to denote "the gifts bestowed in *Srauta* and *Smarta* rites." In the Taittiriya Aranyaka, *Ishtapurtta* occur in much the same sense and Sayana in commenting on the same explains *Ishta* to denote "Vedic rites like Darsa, Purnamasa etc." and *Purta* "to denote *Smarta* works like tanks, wells etc." From the aforesaid judgment it is crystal clear that service worship of the Deities comes within the definition of *Ishta* as such depriving Hindus to worship at Sri Ramjanamsthan on Sthandil would amount to depriving them from the result of *Ishta* i.e. ultimate goal of salvation at the cost of less expenditure and less efforts. In view of such religious belief of the Hindus the Suit premises is not fit for being declared as mosque it is respectfully submitted. Relevant extract from para 6 of the said judgement reads as follows:

"6. "From very ancient times the sacred writing of the Hindus divided works productive of religious merit into two divisions named *ishta* and *purta* a classification which has come down to our times. So much so that the entire objects of Hindu endowments will be found included within the enumeration of *ishta* and *purta* works. In the Rig Veda *ishtapurttam* (sacrifices and charities) are described as means of the going to heaven. In commenting on the same passage Sayana explained *ishtapurtta* to denote "the gifts bestowed in *srauta* and *amarka* rites." In the Taittiriya Aranyaka, *ishtapurtta* occur in much the same sense and Sayana in commenting on the same explains *ishta* to denote "Vedic rites like Darsa, Purnamasa etc." and *purta* "to denote *Smarta* works like tanks, wells etc." ... "

13. IN AIR 1995 SUPREME COURT 1531 = (1995) 3 SCC 635 "Sarla Mudgal, President, Kalyani v. Union of India" the Hon'ble Supreme Court held that religion is more than mere matter of faith. The Constitution by guaranteeing

freedom of conscience ensured inner aspects of religious belief. And external expression of it were protected by guaranteeing right to freely practice and propagate religion. Relying on said judgment it is submitted that as the Suit premises is the Birth Place of the Lord of Universe Sri Rama and his invisible power is present in the said Sthandil the Hindus have superior fundamental right to worship at that sacred place according to injunctions of their Sacred Scriptures in comparison to the fundamental right of the Muslims to offer their prayer at that place which is not an integral part of Muslim religion. Relevant paragraph 43 of the said judgment reads as follows:

“43. When Constitution was framed with secularism as its deal and goal, the consensus and conviction to be one, socially, found its expression in Article 44 of the Constitution. But religious freedom, the basic foundation of secularism, was guaranteed by Articles 25 to 28 of the Constitution. Article 25 is very widely worded. It guarantees all persons, not only freedom of conscience but the right to profess, practice and propagate religion. What is religion? Any faith or belief. The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And external expression of it were protected by guaranteeing right to freely practice and propagate religion. Reading and reciting holy scriptures, for instance, Ramayana or Quran or Bible or Guru Granth Sahib is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to a temple, mosque, church or gurudwara.”

14. In AIR 1962 SUPREME COURT 853 “Sardar Syedna Taher Saifuddin Saheb v. State of Bombay” held that the protection of Articles 25 and 26 of the Constitution of India is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion as also that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and practices which are regarded by the community as a part of its religion.

“34. The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in 1954 SCR 1005 : (AIR 1954 S.C. 282), Ramanuj Das v. State of Orissa 1954 SCR 1046 : (AIR 1954 SC 400), 1958 SCR 895 : (AIR 1958 S.C. 255); (Civil Appeal No. 272 of 1960 D/- 17-3-1961 : (AIR 1961 SC 1402), and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular

religion and include practices which are regarded by the community as a part of its religion."

15. In *Pannalal Bansilal Pitti v. State of A.P.*, (1996) 2 SCC 498, the Hon'ble Supreme Court held that the Hindus are majority in population and Hinduism is a major religion. While Articles 25 and 26 granted religious freedom to minority religions like Islam, Christianity and Judaism, they do not intend to deny the same guarantee to Hindus. Relying on said judgement it is most respectfully and humbly submitted that this Hon'ble Court would be pleased to dismiss the instant Suit and to protect the integral part of religious and customary practices of the Hindus i.e. their right to offer service and worship to the Lord of Universe Sri Ramlala's Idol & *Sthandil* at Sri Ramajanamasthan which has been described as Babari Mosque in the plaint otherwise the superior fundamental right of the Hindus shall be infringed and they shall suffer with irreparable loss and injury which cannot be compensated in any manner whatsoever and justice shall suffer adversely. Relevant paragraph 26 and 27 of the said judgment read as follows:

26. Hindus are majority in population and Hinduism is a major religion. While Articles 25 and 26 granted religious freedom to minority religions like Islam, Christianity and Judaism, they do not intend to deny the same guarantee to Hindus. Therefore, protection under Articles 25 and 26 is available to the people professing Hindu religion subject to the law therein. The right to establish a religious and charitable institution is a part of religious belief or faith and, though law made under clause (2) of Article 25 may impose restrictions on the exercise of that right, the right to administer and maintain such institution cannot altogether be taken away and vested in other party; more particularly, in the officers of a secular Government. The administration of religious institution or endowment or specific endowment being a secular activity, it is not an essential part of religion and, therefore, the legislature is competent to enact law, as in Part III of the Act, regulating the administration and governance of the religious or charitable institutions or endowment. They are not part of religious practices or customs. The State does not directly undertake their administration and expend any public money for maintenance and governance thereof. Law regulates appropriately for efficient management or administration or governance of charitable and Hindu religious institutions or endowments or specific endowments, through its officers or officers appointed under the Act.

27. The question then is whether legislative declaration of the need for maintenance, administration and governance of all charitable and Hindu religious institutions or endowments or specific endowments and taking over the same and vesting the management in a trustee or board of trustees is valid in law. It is true, as rightly contended by Shri P.P. Rao, that the legislature acting on the material collected by Justice Challa Kondaiah Commission amended and repealed the predecessor Act of 1966 and brought the Act on statute. Section 17 of the predecessor Act of 1966 had given power to a hereditary trustee to be the chairman of the board of non-hereditary trustees. Though abolition

of hereditary right in trusteeship under Section 16 has already been upheld, the charitable and religious institution or endowment owes its existence to the founder or members of the family who would resultantly evince greater and keener responsibility and interest in its proper and efficient management and governance. The autonomy in this behalf is an assurance to achieve due fulfilment of the objective with which it was founded unless, in due course, foul in its management is proved. Therefore, so long as it is properly and efficiently managed, he is entitled to due freedom of management in terms of the deed of endowment or established practice or usage. In case a board of trustees is constituted, the right to preside over the board given to the founder or any member of his family would generate feelings to actively participate, not only as a true representative of the source, but the same would also generate greater influence in proper and efficient management of the charitable or religious institution or endowment. Equally, it enables him to persuade other members to follow the principles, practices, tenets, customs and sampradayams of the founder of the charitable or religious institution or endowment or specific endowment. Mere membership along with others, many a times, may diminish the personality of the member of the family. Even in case some funds are needed for repairs, improvement, expansion etc., the board headed by the founder or his family member may raise funds from the public to do the needful, while the executive officer, being a government servant, would be handicapped or in some cases may not even show interest or inclination in that behalf. With a view, therefore, to effectuate the object of the religious or charitable institution or endowment or specific endowment and to encourage establishment of such institutions in future, making the founder or in his absence a member of his family to be a chairperson and to accord him major say in the management and governance would be salutary and effective. The founder or a member of his family would, thereby, enable to effectuate the proper, efficient and effective management and governance of 518 charitable or religious institution or endowment or specific endowment thereof in future. It would add incentive to establish similar institutions.

ABOUT THE AUTHOR

His Eminence P. N. Mishra, an erudite Scholar and versatile genius was born on 5th December 1959 and Graduated in Science and Law started his career as an Advocate of High Court, Calcutta and after a decade extended his field of practice to the Supreme Court of Bharat and other High Courts of the country. He practised in Civil : Special, Revisional, Appellate and Constitutional Writ Jurisdictions covering variety of cases such as Land, Educational, Electricity, Service, Contract, Tender, Commerce, Corporate, Municipal, Tele-communication, Police, Matrimonial, Testamentary, Public Interest Litigation matters and thereby Mr. Mishra achieved great exaltation, name and fame in legal profession.

Mr. Mishra's Commentary and English translation of the Laws of Shankarite Monasteries namely Mathamnyay-Mahanushasanam of Adi Shankaracharya is an authoritative work in the field of Hindu law.

In the field of history, Mr. Mishra's books: Era of Adi Shankaracharya, Amit Kalrekha – Arvacheenamat Khandan, Amit Kalrekha – Vitandavadimat Khandan, Amit Kalrekha – Saurabh, Amit Kalrekha – Pracheen Mat Mandan containing thousands of authoritative references have wiped off all modern misgivings regarding the birth of Adi Shankaracharya and, diving deep down in the depth of historical, archaeological, numismatics, epigraphical, literary and traditional facts the author has proved that the Great Seer was born in 507 B.C. A section of the official Japanese History related to the Indian National Army of Netaji Subhas Chandra Bose has been translated into Hindi by him in the name of Azad Hind Fauz Ka Itihas . Some of author's original works including 'Shankaracharya ka Vyaktitva and Krititva' have been translated into Bengali, Oriya and Marathi languages.

In the field of Sociology Mr. Mishra has authored a magnanimous book Real form of Varna-system containing thousands of authorities from the Vedas and other authentic Scriptures.

In the academic field Mr. Mishra has made great contribution by founding Srimat Jagadguru Shankaracharya Vaidic Vidya Peetham in Howrah for the purpose of protecting and preserving traditional system of learning of Vedas by recitation and memorising. He is the founder President of Shankaracharya Parampara Avam Samskriti Rakshak Parishad, an organisation meant for protecting and preserving ancient culture and tradition of Bharat.

Garud-Chaitya Mandir of Goddess Para Parmeshwari Ajora Sree designed and being constructed by the author exploiting and developing the information contained in Vedic Sulva-Sutras and Puranas reflects his extraordinary understanding of the Ancient Indian Architecture.

He has been bestowed with honouree titles of Manishi (Omniscient Scholar), Dharmalankar (Jewel of Faith), Mandan-Martanda (Sun amongst Propounders of own principle), Vidwan-Martanda (Sun amongst Scholars) and Mahanubhav (His Eminence) by the Jagadguru Shankaracharyas of Sharda-math-Dwarka, Jyotirmath-Badarikashram and Govardhanmath Puri.



“मजहब नही सिखाता आपस में बैर रखना ।
हिन्दी है हम, वतन है हिन्दोस्तां हमारा ॥
युनान-ओ-मि -ओ-रोमा सब मिट गए जहां से ।
अब तक मगर है बाकी नामों-निशां हमारा ॥
कुछ बात है कि हरस्ती मिटती नही हमारी ।
सदियो रहा है, दुश्मन दौरे-जमा हमारा ॥”

“वतन की फिंक्र कर नादां मुसीबत आने वाली है ।
तेरी बरबादियों के मश्वरे है आसमानों में ॥
न समझोगे तो मिट जाओगे ऐ हिन्दोस्तां वालों ।
तुम्हारी दास्तां तक भी न होगी दास्तानों में ॥”

Quote from the judgement of - Hon'ble Justice S. U. Khan J.

